INDONESIAN LAW

SIMON BUTT AND TIM LINDSEY

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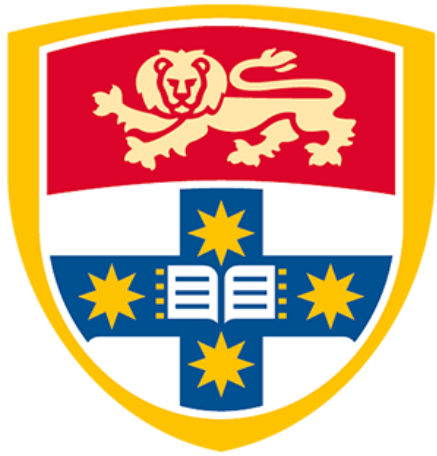

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SIMON BUTT
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TIM LINDSEY

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For the Professors Hooker, Virginia, and Barry, who inspired this BFB

Acknowledgements

We wrote this book because it is what we both needed when we first started researching Indonesian law, but could not find. It is a compendium of laws with commentary that ranges from the technical-legal to the socio-political that is intended to explain how law operates in practice in Indonesia. We hope the book will be useful to scholars and practitioners, and that it will inspire more work on Indonesia's complex legal system by future generations of lawyers.

Writing this book has taken many years, and we are grateful to the Indonesian lawyers and scholars who have generously allowed us to interrogate them, including Professor Jimly Asshiddiqie, Professor Todung Mulya Lubis, Professor Denny Indrayana, Professor Bagir Manan, Professor Jamhari Makruf, Dr Nadirsyah Hosen, and the late Professor Adnan Buyung Nasution.

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Finally, we have both written for many years on Indonesian law and politics, jointly and independently. We have drawn from some of these previous publications in different places in this book and acknowledge this in the footnotes. We have co-authored all chapters in this book, and our names appear as authors in alphabetical order.

Simon Butt and Tim Lindsey
April 2018

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Terminology and Citation

Because individual chapters in this book will likely be read separately from others, a translation of non-English terms used is provided in parentheses or a note the first time each term appears in a chapter. The term is also italicized on first use in that chapter. Most non-English terms also appear in the glossary and list of abbreviations.

LEGAL CITATION

There is no standard citation system for Indonesian laws and judicial decisions, so we have developed our own conventions for this book.

Take, for example, *Undang-undang Nomor 1 Tahun 1974 tentang Perkawinan*. Many authors would translate this, correctly, as Law Number 1 of Year 1974 concerning Marriage, or would refer to it as Law 1/1974 on Marriage. We have simplified the titles of legal instruments by not translating *nomor* (number) and *tahun* (year). We thus refer to this statute as Law 1 of 1974 on Marriage.

For simplicity, 'Law' has been preferred to 'Act', or 'Basic Law', in translating the terms *undang-undang* and *undang-undang pokok*. *Peraturan pengganti undang-undang* is often translated as 'Regulation in Lieu of Law' but we prefer 'Interim Emergency Law', as this more accurately captures its purpose. We reserve 'law' (with a lower case 'l') for *hukum*, which means 'law' in a general sense.

We generally prefer 'Decision' over 'Decree' for *Keputusan*.

For convenience, the term 'Article' (*pasal*) is taken to cover sub-articles, paragraphs, etc. 'Elucidation' has been preferred to 'explanatory memorandum' for *penjelasan*.

Indonesian judicial decisions are usually referred to by case numbers and not by the names of the parties. We provide these case numbers in notes but for convenience have also developed short titles for many of the cases we discuss. Case numbers generally indicate the year in which the relevant case was lodged with the court, rather than the year in which the case was decided.

Laws passed in 2009 led Indonesian government departments to revert to the title 'ministry', so we generally use 'ministry' throughout the book.

TRANSLATION

Kabupaten is translated as 'county', the next administrative division below the provincial level. Largely rural, *kabupaten* are equivalent in status to cities. We have preferred 'county' as the nearest English-language equivalent rather than the more common translation of 'regency'.

The modern Indonesian standard orthography as determined by the Indonesian Ministry of Education since 17 August 1972 is used for all Indonesian words except where *ejaan lama* (old spelling) is used in quotation.

In the case of names, the spelling used by the person named has been preferred where it is known, thus 'Soeharto' rather than 'Suharto'. Although the first president's name is

often spelled 'Sukarno' he signed his name as 'Soekarno', the version also preferred by his children, so we have used this spelling.

CURRENCY

As at September 2017, 1,000 Indonesian Rupiah were worth US$0.074.

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List of Abbreviations

AAI	Asosiasi Advokat Indonesia, Indonesian Advocates Association
ABRI	Angkatan Bersenjata Republik Indonesia, Indonesian armed forces
ADB	Asian Development Bank
AJI	Aliansi Jurnalis Independen, Alliance of Independent Journalists
AKHI	Asosiasi Konsultan Hukum Indonesia, Indonesian Legal Consultants Association
Akses	Asuransi kesehatan Indonesia, Indonesian health insurance
AMAN	Aliansi Masyarakat Adat Nusantara, Indigenous Peoples' Alliance of the Archipelago
Asabri	Asuransi sosial angkatan bersenjata republik indonesia, Indonesian armed forces insurance
ASEAN	Association of Southeast Asian Nations
BAL	Basic Agrarian Law
Baleg	Badan Legislasi, Legislative Committee
BANI	Badan Arbitrase Nasional Indonesia, Indonesian National Board of Arbitration, also known as BANI Arbitration Center
Bappenas	Badan Perencanaan Pembangunan Nasional, National Development Planning Agency
Basyarnas	Badan Arbitrase Syariah Nasional, National Shari'a Arbitration Board
Bawaslu	Badan Pengawas Pemilihan Umum, Election Supervisory Board
BIN	Badan Intelijen Negara, State Intelligence Agency
BIT	Bilateral investment treaty
BKN	Badan Kepegawaian Negara, State Personnel Agency
BKPM	Badan Koordinasi Penanaman Modal, Indonesian Investment Coordination Board
BNI	Bank Negara Indonesia, Indonesian State Bank
BNN	Badan Narkotika Nasional, National Narcotics Agency
BNPT	Badan Nasional Penanggulangan Terorisme, National Counter Terrorism Agency
BPHN	Badan Pembinaan Hukum Nasional, National Legal Development Agency
BPHTN	Bea pengalihan hak atas tanah dan bangunan, land acquisitions tax
BPJS	Badan Penyelenggara Jaminan Sosial, Social Security Administrative Agency
BPK	Badan Pemeriksaan Keuangan, State Audit Board
BPKN	Badan Perlindungan Konsumen Nasional, National Consumer Protection Agency
BPKP	Badan Pengawasan Keuangan dan Pembangunan, Finance and Development Audit Agency
BPN	Badan Pertanahan Nasional, National Land Agency
BPP	Bilangan pembagi pemilu, vote division number
BPS	Badan Pusat Statistik, Central Bureau of Statistics
BPSK	Badan Penyelesaian Sengketa Konsumen, Consumer Dispute Resolution Body
BPUPKI	Badan Penyelidik Usaha-usaha Persiapan Kemerdekaan Indonesia, Investigatory Body for the Preparation of Indonesian Independence
BRI	Bank Rakyat Indonesia, Indonesian People's Bank
BSSN	Badan Siber dan Sandi Negara, State Cyber and Encryption Agency
BTN	Bank Tabungan Negara, National Deposits Bank
BUMN	Badan usaha milik negara, state-owned enterprise
BUPLN	Badan Urusan Piutang dan Lelang Negara, Agency for the Management of State Loans and Auctions
CAT	Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment

CBA	Collective bargaining agreement
CEDAW	Convention on the Elimination of Discrimination Against Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSR	Corporate social responsibility
DOM	Daerah operasi militer, military operations zone
DPD	Dewan Perwakilan Daerah, Regional Representative Assembly
DPR	Dewan Perwakilan Rakyat, People's Representative Assembly
DPRA	Dewan Perwakilan Rakyat Aceh, Aceh People's Representative Assembly
DPRD	Dewan Perwakilan Rakyat Daerah, Regional People's Representative Assembly
EIA	Environmental impact assessment
ELSAM	Lembaga Studi dan Advokasi Masyarakat, Institute for Policy Research and Advocacy
EPML	Environmental Protection and Management Law
FPI	Front Pembela Islam, Islamic Defenders' Front
FTA	Free trade agreement
Gakkumdu	Sentra Penegakan Hukum Terpadu, Coordinated Law Enforcement Centre
GAM	Gerakan Aceh Merdeka, Free Aceh Movement
GBHN	Garis-Garis Besar Haluan Negara, Broad Guidelines of State Policy
Gerindra	Partai Gerakan Indonesia Raya, Greater Indonesia Movement Party
Golkar	Golongan Karya, Functional Group
Granat	Gerakan Nasional Anti-Narkotika, National Anti-Narcotics Movement
Hanura	Partai Hati Nurani Rakyat, People's Conscience Party
HAPI	Himpunan Advokat dan Pengacara Indonesia, Indonesian Lawyers and Advocates Association
HIR	Herziene Indonesisch Reglement, Civil Procedure Code (Java and Madura)
HKHPM	Himpunan Konsultan Hukum Pasar Modal, Association of Capital Market Legal Consultants
HMI	Himpunan Mahasiswa Islam, Muslim Students Association
HRWG	Human Rights Working Group
IBRA	Indonesian Bank Restructuring Agency
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICIP	International Centre for Islam and Pluralism
ICJ	International Court of Justice
ICSID	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ICW	Indonesia Corruption Watch
IDX	Indonesian Stock Exchange
IIGF	Indonesia Infrastructure Guarantee Fund
IJTI	Ikatan Jurnalis Televisi Indonesia, Association of Indonesian Television Journalists
IKADIN	Ikatan Advokat Indonesia, Indonesian Advocates Society
ILO	International Labour Organisation
IMF	International Monetary Fund
Imparsial	Indonesian Human Rights Monitor
INI	Ikatan Notaris Indonesia, Indonesian Notary Association
InMen	Instruksi Menteri, Ministerial Instruction
InPres	Instruksi Presiden, Presidential Instruction
IPHI	Ikatan Penasehat Hukum Indonesia, Indonesian Legal Advisers Association
IPKTM	Izin pemungutan kayu tanah milik, licence to extract timber from private land

IUP	Izin usaha pertambangan, mining business licenses
JAI	Jemaat Ahmadiyah Indonesia
Jamkesmas	Jaminan kesehatan Masyarakat, Community Health Insurance
Jamsostek	Jaminan sosial tenaga kerja, workforce social security
Jokowi	Joko Widodo (President)
KADIN	Kamar Dagang dan Industri Indonesia, Indonesian Chamber of Commerce
KDirJen	Keputusan Direktur Jenderal, Director General Decision
KepMen	Keputusan Menteri, Ministerial Decision
KepPres	Keputusan Presiden, Presidential Decision
KHL	Kebutuhan hidup layak, adequate living needs
KK	kartu keluarga, family card
KNKG	Komisi Nasional Kebijakan Governance, National Government Policy Commission
KNPI	Komite Nasional Pusat Indonesia, Central Indonesian National Committee
Komnas Anak	Komisi Nasional Perlindungan Anak, National Commission for the Protection of Children
Komnas HAM	Komisi Nasional Hak Asasi Manusia, National Human Rights Commission
Komnas Perempuan	Komisi Nasional Anti Kekerasan Terhadap Perempuan, National Commission on Violence against Women
Kompolnas	Komisi Polisi Nasional, National Police Commission
KontraS	Komisi untuk Orang Hilang dan Korban Kekerasan, Commission for the Disappeared and Victims of Violence
KP3T	Komisi Penyelidikan dan Pemeriksaan Pelanggaran HAM di Tanjung Priok, Commission for Inquiry and Investigations of Human Rights Violations in Tanjung Priok
KPAI	Komisi Perlindungan Anak Indonesia, Indonesian Child Protection Commission
KPEI	Kliring Penjaminan Efek Indonesia, Indonesian Clearing and Guarantee Corporation
KPI	Komisi Penyiaran Indonesia, Indonesian Broadcasting Commission
KPK	Komisi Pemberantasan Korupsi, Corruption Eradication Commission
KPKPN	Komisi Pemeriksa Kekayaan Penyelenggara Negara, Public Official Asset Investigation Commission
KPP-HAM	Komisi Penyelidikan Pelanggaran HAM, Commission of Inquiry into Human Rights Violations (in East Timor)
KPP-TSS	Komisi Penyelidikan dan Pemeriksaan Pelanggaran HAM di Trisakti and Semanggi, Commission of Inquiry and Investigation into Human Rights Violations in Trisakti and Semanggi
KPPU	Komisi Pengawas Persaingan Usaha, Commission for the Supervision of Business Competition
KPU	Komisi Pemilihan Umum, General Electoral Commission
KSEI	Kustodian Sentral Efek Indonesia, Indonesian Central Securities Depository
KTP	Kartu tanda penduduk, identity card
KUHAP	Kitab Undang-Undang Hukum Acara Pidana, Criminal Procedure Code
KUHD	Kitab Undang-Undang Hukum Dagang (Wetboek van Koophandel voor Indonesië), Commercial Code
KUHP	Kitab Undang-Undang Hukum Pidana, Criminal Code
KUHPerdata	Kitab Undang-Undang Hukum Perdata (Burgerlijk Wetboek voor Indonesië), Civil Code

LBH	Lembaga Bantuan Hukum, Indonesian Legal Aid Institute
LeIP	Lembaga Kajian dan Advokasi untuk Independensi Peradilan, Institute of Advocacy and Study for an Independent Judiciary
LPS	Lembaga Penjamin Simpanan, Indonesian Deposit Insurance Corporation
LPSK	Lembaga Perlindungan Saksi dan Korban, Witness and Victim Protection Agency
LSF	Lembaga Sensor Film, Film Censorship Board
LSI	Lembaga Survei Indonesia, Indonesian Survey Institute
MAKI	Perkumpulan Masyarakat Anti Korupsi, Indonesian Anti-Corruption Community
Migas	Minyak dan gas bumi, oil and natural gas
MK	Mahkamah Konstitusi, Constitutional Court
MOHA	Ministry of Home Affairs
Monas	Monumen Nasional, National Monument
MPR	Majelis Permusyawaratan Rakyat, People's Consultative Assembly
MPU	Majelis Permusyawaratan Ulama, Consultative Assembly of Ulama
MRP	Majelis Rakyat Papua, Papuan People's Assembly
MUI	Majelis Ulama Indonesia, Indonesian Ulama Council
NGO	Non-governmental organisation
NJOP	Nilai jual objek pajak, tax object sale value
NKRI	Negara Kesatuan Republic Indonesia, Unitary Republic of Indonesia
NPWP	Nomor pendaftaran wajib pajak, tax file number
OJK	Otoritas Jasa Keuangan, Financial Services Authority
OPM	Organisasi Papua Merdeka, Free Papua Movement
P4	Panitia Penyelesaian Perselisihan Perburuhan, Committee for the Resolution of Labour Disputes
PAN	Partai Amanat Nasional, National Mandate Party
Pansus	Panitia khusus, special committee
PBB	Pajak bumi dan bangunan, land and building tax
PDI	Partai Demokrasi Indonesia, Indonesian Democracy Party
PDI-P	Partai Demokrasi Indonesia—Perjuangan, Indonesian Democratic Party—Struggle
PERADI	Perhimpunan Advokat Indonesia, Indonesian Advocates Association
PERADIN	Persatuan Advokat Indonesia, Indonesian Advocates Union
Perda	Peraturan Daerah, Regional Regulation
PerDirJen	Peraturan Direktur Jenderal, Director General Regulation
Perkada	Peraturan Kepala Daerah, Regional Head Regulations
PerMA	Peraturan Ketua Mahkamah Agung, Regulation of the Supreme Court Chief Justice
PerMen	Peraturan Menteri, Ministerial Regulation
Perpres	Peraturan Presiden, Presidential Regulation
Perpu, Perppu	Peraturan Pengganti Undang-Undang, 'Regulations in Lieu of Statute' or interim emergency law
Persero	Perusahaan perseroan, state share company
Perum	Perusahaan umum, public (state-owned) company
PK	Peninjauan kembali, Supreme Court reconsideration, 'judicial review'
PKB	Partai Kebangkitan Bangsa, National Awakening Party
PKI	Partai Komunis Indonesia, Indonesian Communist Party
PKS	Partai Keadilan Sejahterah, Prosperous Justice Party
PLN	Perusahan Listrik Negara, State Electricity Company
PMA	Perusahaan penanaman modal asing, foreign capital investment company
PP	Peraturan Pemerintah, Government Regulation

PPATK	Pusat Pelaporan dan Analisis Transaksi Keuangan, Centre for Financial Transaction Reporting and Analysis
PPKI	Panitia Persiapan Kemerdekaan Indonesia, Committee for the Preparation of Indonesian Independence
PPP	Public-private partnership
PPP	Partai Persatuan Pembangunan, United Development Party
Prolegnas	Program legislasi nasional, national legislative programme
PSHK	Pusat Studi Hukum dan Kebijakan, Centre for the Study of Law and Public Policy
PT	Perseroan terbatas, Limited liability
PTSP	Pelayanan terpadu satu pintu, integrated one-stop service centre
PWI	Persatuan Wartawan Indonesia, Indonesian Journaists Association
RBg	Reglement Buitengewesten, Civil Procedure Code (valid outside Java and Madura)
REDD+	Reduced emissions from deforestation and forest degradation
RIS/RUSI	Republik Indonesia Serikat, United States of Indonesia
RRI	Radio Republik Indonesia, Radio of the Republic of Indonesia
RUU	Rancangan udang-undang, Bill or draft statute
SARA	Suku, agama, ras, antargolongan, ethnicity, religion, race and intergroup relations
SBSI	Serikat Buruh Sejahtera Indonesia, Prosperous Workers Union of Indonesia
SBY	Susilo Bambang Yudhoyono (President)
Setkab	Sekretariat Kabinet, Cabinet Secretariat
SIAC	Singapore International Arbitration Centre
SIC	Surat izin cetak, printing permit
SIT	Surat izin terbit, publishing permit
SIUPP	Surat izin usaha penerbitan, press publication enterprise permit
SKBMenteri	Surat Keputusan Bersama Menteri, Joint Ministerial Letter
SP3	Surat Perintah Perhentian Penyidikan, Cessation of Investigation Order
SPI	Serikat Pengacara Indonesia, Indonesian Lawyers Union
Susesnas	Survei sosial ekonomi nasional, national socio-economic household survey
Taspen	Dana tabungan dan asuransi pegawai negeri, civil servants pension fund
TNI	Tentara Nasional Indonesia, Indonesian military
TVRI	Televisi Republik Indonesia, Television of the Republic of Indonesia
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States
VOC	Vereenigde Oost-Indisch Compagnie, Dutch East India Company
Walhi	Wahana Lingungan Hidup Indonesia, Indonesian Forum for the Environment
Wantimpres	Dewan Pertimbangan Presiden, Presidential Advisory Council
YLBHI	Yayasan Lembaga Bantuan Hukum Indonesia, Indonesian Legal Aid Foundation
YLKI	Yayasan Lembaga Konsumen Indonesia, Indonesian Consumer Protection Foundation

PANCASILA

1. KETUHANAN YANG MAHA ESA
2. KEMANUSIAAN YANG ADIL DAN BERADAB
3. PERSATUAN INDONESIA
4. KERAKYATAN YANG DIPIMPIN OLEH HIKMAT KEBIJAK-SANAAN DALAM PERMUSYAWARATAN / PERWAKILAN
5. KEADILAN SOSIAL BAGI SELURUH RAKYAT INDONESIA

PART I

THE LEGAL SYSTEM

1

The Constitution and State Institutions

INTRODUCTION

This chapter provides an overview of the basic legal structure of the Indonesian state. Because understanding Indonesia's complex state system is difficult without understanding how it developed, the chapter begins with a brief account of Indonesia's constitutional history, including the four amendments made to the 1945 Constitution between 1999 and 2002. We then offer a description of the Constitution's key provisions, in roughly ascending order, including the state institutions it establishes and the state ideology, Pancasila. The chapter concludes with an account of important state institutions that are established by laws other than the Constitution.

INDONESIA'S CONSTITUTIONS

Since declaring its independence on 17 August 1945, Indonesia has had four constitutions, reflecting political transitions from authoritarianism to liberal democracy, then back to authoritarianism and, most recently, towards liberal democracy again. The first was the 1945 Constitution, which Indonesia's first president, Soekarno, proclaimed on 18 August that year. The second was the short-lived Constitution of the Federal Republic of Indonesia, which lasted from 27 December 1949 until 17 August 1950, when it was replaced by Indonesia's third constitution—the Interim Constitution of 1950. In 1959, Soekarno reinstated the 1945 Constitution, which remained in force unamended throughout Soeharto's New Order, from 1966 to 1998. After Soeharto's fall, the 1945 Constitution was amended every year from 1999 to 2002. Although still called the 1945 Constitution, the document is now very different to the original proclaimed by Soekarno. The old structural core of the document remains but features of liberal democracy have replaced provisions that underpinned the authoritarian regimes of Soekarno (after 1959) and Soeharto.[1]

The 1945 Constitution

Indonesia's first independent constitution was the result of opportunities occupying Japanese forces gave Indonesian nationalist leaders to meet to plan limited independence within the so-called Japanese Greater East Asia Co-Prosperity Sphere.[2] The Japanese established the sixty-two-member BPUPKI or Investigating Committee for the Preparation of Independence on 29 April 1945.[3] Over the following months, the Committee hosted debates about whether Indonesia should aspire to liberal democracy, a socialist model, an Islamic state, or an authoritarian system. After BPUPKI's final meeting, its chairperson, Radjiman Wediodiningrat, established the 'Committee of Nine', chaired by Soekarno, to draft the Preamble to the Constitution. Another committee was established to draft the Constitution itself.[4] This

[1] This section draws on Simon Butt, 'Constitutions and Constitutionalism' in Robert Hefner (ed), *Routledge Handbook of Indonesia* (Routledge 2017); Simon Butt and Tim Lindsey, *The Indonesian Constitution: A Contextual Analysis* (Hart 2012).

[2] MC Ricklefs, *A History of Modern Indonesia since C. 1200* (Stanford University Press 2008) 244–47.

[3] *Dokuritzu Zunbi Tjoosakai* (*Badan Penyelidik Usaha-usaha Persiapan Kemerdekaan Indonesia*, BPUPKI).

[4] Hendarmin Ranadireksa, *Dinamika Konstitusi Indonesia: Ada Apa dengan UUD 1945 (Original), Maklumat X, UUDs RIS, UUDs 1950, UUD 1945 Pasca Dekrit 5 Juli 1959, UUD 1945 di Era Orde Baru, UUD 1945 Amandemen I S/D IV?* (Fokusmedia 2007) 17.

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was chaired by renowned jurist, Soepomo, who earlier had advocated integralist totalitarianism as the best model for Indonesia to adopt, and was primarily responsible for drafting the 1945 Constitution.[5]

In early August, key Indonesian leaders were called to Saigon to meet senior Japanese army figures to discuss Indonesia's transition towards semi-autonomy. They included Soekarno, Wediodiningrat, and Hatta (who became Indonesia's first vice-president, and later prime minister). There, the PPKI, or Committee for the Preparation of Indonesian Independence,[6] was established, with Soekarno and Hatta as chair and deputy chair. They returned to Indonesia on 14 August, the day before the Japanese surrendered. With Japanese leadership in disarray, Soekarno and Hatta, under pressure from their own supporters, declared independence on 17 August 1945. On the following day, the PPKI proclaimed the 1945 Constitution and decided that it would come into force on 19 August.[7]

The 1945 Constitution was hastily conceived and very short. As discussed below, it established the framework under which a strong presidential system flourished, with very few constraints, during the successive authoritarian regimes of Soekarno and Soeharto. While it mentioned a handful of human rights—such as freedom of speech and association—it did not grant them to citizens. Instead, it merely ordered the legislature to regulate those rights.[8]

Soekarno and the other drafters clearly saw the 1945 Constitution as imperfect and provisional. In a speech about the 1945 Constitution made before the PPKI on 18 August, Soekarno said:

> All you gentlemen certainly understand that the Constitution we have now made is a temporary Constitution. If I may use these words: 'this is a lightning (*kilat*) Constitution'. Later, when we have come together as a nation, and the situation is calm, we will certainly … create a more complete and perfect Constitution.[9]

It was not long before the document was amended, albeit indirectly. Within two months, influential figures became concerned that Soekarno and his cabinet were becoming 'far too authoritarian' and began agitating for a parliamentary system.[10] The Central Indonesian National Committee (KNPI),[11] which had been established soon after Independence to advise the president, was given legislative powers, at least until a parliament could be elected. A prime ministership, with its own cabinet, was also established.[12] These changes were effected by Maklumat (Decree) X of 16 October 1945, issued by Vice-President Hatta.

Many Indonesian constitutional law scholars conclude that Maklumat X effectively amended Article 17 of the Constitution, even though the text itself was not changed. Article 17 referred to the president being assisted by ministers, whom he or she could appoint and dismiss. No mention was made of prime ministers and cabinets. Some scholars find no fault with this, arguing that Maklumat X simply expressed state convention,[13] or emphasizing that both the president and the KNPI freely endorsed it.[14] Others rightly question

[5] Daniel S Lev, 'Between State and Society: Professional Lawyers and Reform in Indonesia' in Timothy Lindsey (ed), *Indonesia: Law and Society* (1st edn, Federation Press 1999) 232.

[6] *Dokuritzu Zunbi Iinkai* (*Panitia Persiapan Kemerdekaan Indonesia*, PPKI).

[7] Ranadireksa (n 4) 20.

[8] Bagir Manan, *Membedah UUD 1945* (Moh Fadli ed, UB Press 2012) 16. See also Todung Mulya Lubis, *In Search of Human Rights: Legal-Political Dilemmas of Indonesia's New Order, 1966–1990* (Gramedia Pustaka Utama 1993).

[9] Our translation. Original text obtained from Ranadireksa (n 4) iv.

[10] George Kahin, *Nationalism and Revolution in Indonesia* (Cornell University Press 1952) 152.

[11] *Komite Nasional Pusat Indonesia*, KNPI. [12] Kahin (n 10) 152.

[13] Ismail Suny, *Pergeseran Kekuasaan Eksekutif: Suatu Penyelidikan dalam Hukum Tatanegara* (Aksara Baru 1977); Supomo, *Undang-undang Dasar Sementara Republik Indonesia* (Noordhoff-Kolff 1950).

[14] Bintan Regen Saragih, *Perubahan, Penggantian dan Penetapan Undang-Undang Dasar di Indonesia* (Utomo 2006) 39; Assaat, *Hukum Tatanegara Republik Indonesia dalam Masa Peralihan* (Bulan-Bintang 1951).

whether Maklumat X was a valid exercise of vice-presidential power.[15] Presumably, however, the Constitution—understood in Indonesia as elsewhere as the *grundnorm*—trumps a maklumat, and cannot, therefore, be amended by one. Other scholars argue that to adopt a parliamentary system, the amendment process contained in Article 37 of the Constitution had to be followed.[16] This required two-thirds of People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*, MPR) members to agree to amendments at a meeting where two-thirds of MPR members were present.[17] To be fair, the MPR had not yet been established, so amendment using this process would have been impossible to achieve quickly, but the value of a constitution is questionable if its provisions can be so easily circumvented. To these criticisms, we would add that convention cannot be established without ever being practised.

In any case, whatever the concerns about the process, Maklumat X was implemented and a parliamentary system adopted, with Sutan Syahrir as Indonesia's first prime minister.

The Constitution of the Federal Republic of Indonesia (1949) and the Interim Constitution of 1950

Like the 1945 Constitution, the 1949 Constitution was intended to be temporary but it was abandoned even more quickly than most expected, making it Indonesia's shortest-lived constitution.

Soon after Independence, Dutch forces had returned to Indonesia, seeking to re-establish control. This triggered significant armed resistance from Indonesian fighters and, eventually, protests in the United Nations. In 1949, the Dutch formally agreed to withdraw their claim of sovereignty but strongly supported efforts for the establishment of a federal system in Indonesia. Although some regional leaders welcomed this, most senior Indonesian leaders loathed it, believing federalism would leave their new state fragmented and weak. They had little choice, however, as the Dutch saw the creation of a federation as a basic condition of their withdrawal. A Constitutionalism and Constitutional Law Committee (*Panitia Urusan Ketatanegaraan dan Hukum Tatanegara*) that included both Indonesian and Dutch delegates met in Holland to draft the 1949 Constitution as the legal basis for this new system.

This Constitution established the Republic of the United States of Indonesia (*Republik Indonesia Serikat*, RUSI), comprising sixteen states. It also provided for democratic government, human rights, and judicial review.[18] However, the federal system proved deeply unpopular from the very beginning, with many Indonesian politicians believing it would help the Dutch to resume their rule through 'puppet' states.[19] In January 1950, a failed revolt led by a Dutch soldier, 'Turk' Westerling, implicated leaders of the Pasundan state and galvanized support for a unitary republic. Fighting followed in eastern Indonesia but within a few months member states had ceded their authority to the Republic and the Federation collapsed.[20] By 17 August 1950, the fifth anniversary of the original proclamation of independence, the Federal Constitution had been replaced with the Interim Constitution of 1950, drafted in just two months.

Like the de facto amendment to the 1945 Constitution by Maklumat X, discussed above, the 1949 Constitution was enacted by simple executive instrument: Presidential Decision

[15] Ni 'matul Huda, *UUD 1945 dan Gagasan Amandemen Ulang* (Rajawali Pers 2008) 160–61.
[16] Manan (n 8) 108.
[17] As discussed below, the Fourth Amendment in 2002 reduced the quorum for amendment to 50 per cent + 1 agreeing at a meeting where two-thirds of MPR members are present.
[18] See, for example, Arts 7–32, 156–57, 1949 Constitution.
[19] Huda (n 15) 165.
[20] Ricklefs (n 2) 270.

48 of 1950.[21] Because the legal basis for the adoption of the Federal Constitution was a presidential decision, its legal validity has been questioned on similar grounds to those put forward by critics of Maklumat X. There was, for example, no attempt to use the procedures set out in Article 37 of the 1945 Constitution to bring the Federal Constitution into force. The only legal justification for the 1949 Constitution's introduction, mentioned in the Preamble to Presidential Decision 48 of 1950, appears to be the agreement between national and state delegates reached when the Constitution was drafted in Holland, which was then endorsed by the national and state governments, the Central Indonesian National Committee, and the parliaments of each state.

As mentioned, the Federal Constitution of 1949 was always intended to be temporary. Article 186 of the 1949 Constitution entrusted its replacement to a constituent assembly (*Konstituante*)—a joint sitting of the national parliament and the senate (Article 188). Like Article 37 of the 1945 Constitution, Article 189 of the 1949 Constitution required that replacement or amendment of its provisions be endorsed by a two-thirds majority of the *Konstituante* at a meeting of the *Konstituante* attended by at least two-thirds of its members. Yet these provisions were ignored when the 1950 Constitution was introduced, this time by national statute: Law 7 of 1950. This left the legal basis for the adoption of the 1950 Constitution highly questionable, just as had been the case with the adoption of the 1949 Constitution.

The 1950 Constitution had been drafted by yet another committee, and was approved on 14 August 1950.[22] It retained many aspects of the 1949 Constitution—including a largely democratic system, human rights, and the separation of powers—leading some commentators to suggest that it was, at its heart, really only a version of the 1949 Constitution with the federal system stripped out.[23] Under the Interim Constitution of 1950, Indonesia's first democratic elections were held in 1955, as were elections to fill a new *Konstituante* with the mandate to draft a permanent constitution. The 1950 Interim Constitution once again required at least two-thirds of those present at a meeting of at least two-thirds of *Konstituante* members to approve any new constitution (Article 137). It also provided for a People's Representative Assembly (*Dewan Perwakilan Rakyat*, DPR) that was democratically elected and had broad legislative powers, and the government, run by a cabinet chaired by the prime minister, was formally answerable to it. Despite this, President Soekarno retained strong authority.[24] He was, for example, unimpeachable and could, in fact, disband the DPR.[25]

Within a few years, however, Indonesia's first democratic experiment met its end. The *Konstituante* had established an eighteen-member constitution drafting committee in late 1957. It had made little progress, partly because the committee could not agree on the *dasar negara*, or basis of the Indonesian state, with members irreconcilably divided over whether it would be Islam or the Pancasila ideology (discussed below) that had appeared in the Preamble to all three previous constitutions.[26] Other problems emerged: the 1955 parliament was highly fragmented and became deadlocked and unable to pass legislation; the Indonesian Communist Party (*Partai Komunis Indonesia*, PKI) was garnering widespread grassroots support, which the military perceived as a direct threat; and numerous armed regional rebellions, including in West Java, West Sumatra, and South Sulawesi, threatened the nation's integrity.

[21] This Decision, which was enacted on 31 January 1950, purported to operate retrospectively—that is, it declared that the Constitution had been in force since the restoration of Indonesian sovereignty, on 27 December 1949: Saragih (n 14) 27. This was confirmed in Art 197 of the Constitution itself, which declared itself to have come into force on the same date.

[22] Ranadireksa (n 4) 59.

[23] Saragih, *Perubahan, Penggantian dan Penetapan Undang-Undang Dasar di Indonesia* (n 14) 40.

[24] Ranadireksa (n 4) 64–65.

[25] Manan (n 8) 49.

[26] Ricklefs (n 2) 298, 302–03. See also Adnan Buyung Nasution, *The Aspiration for Constitutional Government in Indonesia: A Socio-Legal Study of the Indonesian Konstituante, 1956–1959* (1st edn, Pustaka Sinar Harapan 1992).

In response, the army urged Soekarno to return to the 1945 Constitution; and the *Konstituante* was also asked three times to formally revert to it.[27] Initially, both refused, with Soekarno fearing that it would hand the army excessive political power. He did, however, declare a 'State of War and Siege' in March 1957, reflecting a common perception that the new republic's survival was in jeopardy. This was a declaration of martial law. It effectively suspended parliamentary democracy, allowed Soekarno to appoint his own government, and set in motion what would soon become his 'Guided Democracy' dictatorship.[28]

The return to the 1945 Constitution

Eventually Soekarno formalized the *autogolpe* by which he had placed himself at the heart of Indonesia's political system. As in previous transitions, the constitutional provisions regulating constitutional change were ignored. Soekarno disbanded the *Konstituante* and returned to the 1945 Constitution by issuing a Decree on 5 July 1959. This criticized the *Konstituante* for failing to return to the 1945 Constitution despite the urgings of the president and the government 'that had been conveyed by the Indonesian people', and for refusing to hold further sessions. According to the Decree, this 'led to a constitutional situation that endangered the unity and safety of the nation and impeded the development needed to achieve a just and prosperous society'. It continued: 'With the support of the majority of the Indonesian people, and pushed by my own convictions, I am forced to take the only course to save the Proclaimed Nation.' The Decree then invalidated the 1950 Constitution and reinstated the 1945 Constitution from the date of the Decree.

The legality of this constitutional transition is a matter of much debate,[29] particularly given the subsequent longevity of the 1945 Constitution. Some argue that the Decree was justifiable as an exercise of emergency powers.[30] Certainly, these justifications were adopted by the 'New Order' (*Orde Baru*) government, under General Soeharto, who had wrested control of the presidency from Soekarno by 1966. A government dominated by the military, the New Order had a clear interest in maintaining the 1945 Constitution. Implicitly recognizing the legal weakness of Soekarno's Decree of 1959, the Interim MPR,[31] constituted after Soeharto took power, issued its own Decree in 1966 to shore up the legitimacy of the transition.[32] This Decree repeatedly emphasizes the importance of Soeharto being given the authority to 'take all action considered necessary to guarantee the security, calmness and the stability of the government and the progress of the Revolution … ' given that, under the previous regime, the 1945 Constitution had been implemented with numerous 'deviations'. Like Soekarno's 1959 Decree reintroducing the 1945 Constitution, this MPR Decision justified itself as an emergency measure that was supported by all people, and was approved soon afterwards by a democratically elected legislature.

These arguments are not convincing. The 1950 Constitution did, in fact, contain provisions dealing with 'emergency legislation', which empowered the government to legislate on issues that 'because of pressing circumstances needed to be regulated immediately' (Article 96(1)). However, such emergency legislation has the legal status of a statute (Article 96(2)) and, therefore, cannot trump the Constitution, from which authority to issue statues derives. As an even weaker form of law, the Presidential Decree of 1959 clearly lacked the authority to remove the democratically elected *Konstituante* or perform the constitutionally

[27] Huda (n 15) 173. [28] Ricklefs (n 2) 292–95.

[29] Krisna Harahap, *Konstitusi Republik Indonesia Menuju Perubahan Ke-5* (Grafitri Budi Utami 2009); 'Memori Tentang Dekrit Presiden 5 Juli 1959' *Hukumonline* (4 July 2016).

[30] Moh Kusnardi and Harmaily Ibrahim, *Pengantar Hukum Tata Negara Indonesia* (Budi Chaniago 1988).

[31] Majelis Permusyawaratan Rakyat Sementara (MPRS).

[32] MPRS Decree XX/MPRS/1966 on Memorandum to the DPR-GR on the Sources of Law of the Republic of Indonesia and the Hierarchy of Laws in Indonesia.

mandated function of that body: devising a new Constitution. As mentioned, the 1950 Constitution, like the 1949 Constitution before it, clearly specified threshold requirements for constitutional change, and the *Konstituante* itself had expressly rejected calls for reinstatement of the 1945 Constitution. It is difficult to reach any conclusion other than that Soekarno's 1959 Decree was unconstitutional.

In political reality, however, it was very effective. In fact, the New Order government later adopted the 1945 Constitution as its ideological centrepiece. It declared that, by contrast to Soekarno, it would act in accordance with the Constitution. While this may have justified Soekarno's removal, there was little legal substance to these claims. The Constitution itself was so threadbare that it was difficult to prove a breach of it, let alone remedy it. In any event, as discussed below, judicial review was not available, so the state could unilaterally interpret the Constitution as it saw fit, without being held to account. The result was that the New Order government used the ideological lure of the 1945 Constitution to legitimize its authoritarian rule and policies, and even referred to provisions of the Constitution to justify legislation, but was not, in fact, constrained by those provisions.

The Four Amendments

The Asian Economic Crisis of 1997 to 1998 ravaged Indonesian banks and businesses. The economic and political chaos it created was the primary driver of Soeharto's resignation as president in May 1998 but widespread dissatisfaction with the authoritarian nature of his rule had been steadily building for decades. Fears of continuing unrest, and the prospect of Indonesia 'Balkanising', propelled Indonesia's legislature towards genuine constitutional change.[33]

The four annual amendment rounds that took place from 1999 delivered a dramatic recalibration of the Indonesian polity towards liberal democracy, effecting a redistribution of power from the presidency to various national and subnational institutions.[34] In most countries undergoing major constitutional reform, a constitutional commission, constituent assembly, or similar body is established to lead the process. In Indonesia, however, the amendments were thrashed out in often-heated debates on the floor of the MPR, clause by clause. To the surprise of most observers, the 695 members of the MPR in the end decided most questions by overwhelming majorities, without the need to count votes.

The First Amendment

The First Amendment was passed on 19 October 1999, and was primarily directed at reducing the power of the presidency that Soeharto had abused for over thirty years. Originally, the 1945 Constitution referred to power being 'distributed' by the MPR—formally the 'highest' institution of state—to the president and the national legislature. While this meant that the president was accountable to the MPR, Soeharto's control over that body meant he was, in fact, never called to account by it. In practice, the president held significant power, being both head of state and head of government, and having an unlimited number of five-year terms. Importantly, the president had both regulatory and legislative powers, including broad emergency powers. The amendments now limit any future president from holding office for more than two five-year terms and restrict the president's legislative powers, to the benefit of the legislature.

[33] Donald L Horowitz, *Constitutional Change and Democracy in Indonesia* (Cambridge University Press 2013).

[34] Denny Indrayana, *Indonesian Constitutional Reform 1999–2002: An Evaluation of Constitution-Making in Transition* (Penerbit Buku Kompas 2008).

The Second Amendment

Perhaps the most significant of the four amendments was the second, enacted on 18 August 2000. This adopted an array of internationally recognized human rights from the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[35] The Second Amendment was also significant because it recognized regional autonomy, introduced by national legislation enacted in 1999. The Constitution provides subnational governments—that is, provincial, city, and county administrations—with both legislative and regulatory power. This power is 'as broad as possible' but excludes specified issues that fall within the exclusive jurisdiction of the national government.[36] Finally, the president's so-called 'legislative powers' were further curtailed so his or her assent is no longer essential for a bill to become law.

The Third and Fourth Amendments

The main aims of these amendments, passed in 2001 and 2002 respectively, were reducing the MPR's powers and establishing important new institutions, including the Constitutional Court, a Judicial Commission, and the Regional Representative Council (*Dewan Perwakilan Daerah*, DPD). While the MPR can still meet to amend the Constitution, it no longer has power to pass decrees and set state policy, and no longer appoints the president. The president and vice-president are now directly elected by the people. The Third Amendment also established that the MPR can impeach the president on the DPR's recommendation, if the Constitutional Court confirms that the president has committed a serious wrongdoing or no longer meets the requirements to hold office.

THE CONSTITUTION AND CONSTITUTIONAL INSTITUTIONS

In this section, we offer an overview of the principal provisions of the 1945 Constitution as amended between 1999 and 2002, and the key institutions they establish.[37] We pay particular attention to institutions that are not covered in detail elsewhere in this book.

Pancasila

Like every Indonesian constitution before it, the amended 1945 Constitution contains in its Preamble Indonesia's national ideology, Pancasila (literally, 'the five principles'). Put at their most concise, these principles are:

1. *Ketuhanan Yang Maha Esa* (Belief in Almighty God);
2. *Kemanusiaan Yang Adil dan Beradab* (A Just and Civilized Humanity);
3. *Persatuan Indonesia* (The Unity of Indonesia);

[35] Tim Lindsey, 'Indonesian Constitutional Reform: Muddling Towards Democracy' (2002) 6 *Singapore Journal of International and Comparative Law* 244.

[36] Simon Butt, 'Regional Autonomy and the Proliferation of Perda in Indonesia: An Assessment of Bureaucratic and Judicial Review Mechanisms' (2010) 32(2) *Sydney Law Review* 177.

[37] Parts of this section draw on Butt and Lindsey (n 1); Timothy Lindsey and Penelope Nicholson, *Drugs Law and Legal Practice in Southeast Asia: Indonesia, Singapore and Vietnam* (Hart 2016); Tim Lindsey, 'Constitutional Reform in Indonesia: Muddling Towards Democracy' in Tom Ginsburg and Albert HY Chen (eds), *Public Law in East Asia* (Ashgate 2013).

4. *Demokrasi*; and
5. *Keadilan Sosial* (Social Justice).

Soekarno proposed Pancasila to the BPUPKI in a speech on 1 June 1945, although he had been developing the idea for some time, claiming to have 'excavated' it from Indonesian tradition.[38] Largely because these five principles are contained in the Preamble, many Indonesian legal scholars and governments have claimed that the philosophy has more authority than the Constitution itself and is the 'source of all sources of law'. Certainly, a majority of the Constitutional Court recently confirmed Pancasila's legal pre-eminence as Indonesia's basis of state.[39] Most Indonesian jurists consider Pancasila unalterable, although this is undoubtedly false as a matter of law, because there is nothing to prevent the DPR, following Article 37 of the Constitution, from changing or even removing the Preamble.

Pancasila is, however, a particularly vague ideology, anodyne and 'bland',[40] and has therefore proved politically very malleable. After all, it has appeared in or as the Preamble to very different constitutions, including the more liberal democratic 1949 and 1950 Constitutions, the 1945 Constitution, under which authoritarianism thrived, and its present liberal democratic amended form. The very vagueness and flexibility that enabled Pancasila to survive regime changes and major ideological reconfigurations make it an unsuitable basis for a legal system, at least if legal certainty and consistency are aspired to. Much will depend on the way the Constitutional Court interprets it and then whether the Court interprets it consistently. The Court appears to have only recently begun considering Pancasila in its decision-making,[41] and has not yet developed sophisticated jurisprudence to explain precisely what its principles mean or require in practical terms.

The Jakarta Charter

The first principle of Pancasila—'Belief in Almighty God'—has always been controversial.[42] This is because the Committee of Nine, appointed in 1945 to consider the *dasar negara* issue, included in its original formulation the additional words: 'with the obligation to carry out Islamic shari'a for its adherents' (*dengan kewajiban menjalankan syariat Islam bagi pemeluk-pemeluknya*). These momentous 'seven words', as the deleted phrase became known,[43] did not appear in the final draft of the Constitution when it was promulgated on 18 August 1945. They were deleted as the Constitution was being finalized, along with a requirement that the president be a Muslim, at the insistence of Soekarno and Hatta but in unclear and controversial circumstances.[44] Soekarno and Hatta were at least partly motivated by secular nationalist objection to the constitutional imposition of religious laws, and

[38] Robert Cribb, 'The Incredible Shrinking Pancasila: Nationalist Propaganda and the Missing Ideological Legacy of Suharto' in Thomas Reuter (ed), *The Return to Constitutional Democracy in Indonesia* (Monash Asia Institute 2010) 73; Ken Ward, 'Soeharto's Javanese Pancasila' in Edward Aspinall and Greg Fealy (eds), *Soeharto's New Order and Its Legacy: Essays in Honour of Harold Crouch* (ANU Press 2010) 2.

[39] Constitutional Court Decision 100/PUU-XI/2013. See also, Simon Butt, 'Judicial Review in Indonesia: Between Civil Law and Accountability? A Study of Constitutional Court Decisions 2003–2005' (PhD Dissertation, Law Faculty, Melbourne University 2007).

[40] Cribb (n 38) 73.

[41] See, for example, Constitutional Court Decision 100/PUU-XI/2013.

[42] This section draws on Timothy Lindsey, *Islam, Law and the State in Southeast Asia: Volume 1 Indonesia* (IB Tauris 2012) 36–54.

[43] Michael Feener, 'Indonesian Movements for the Creation of a "National Madhhab" ' 9(1) *Islamic Law and Society* 83, 86.

[44] See H Muhammad Yamin, *Naskah Persiapan Undang-Undang Dasar 1945*, vol 1 (Yayasan Prapanca 1959) 145; Arskal Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia* (University of Hawaii Press 2008) 64–69; BJ Boland, *The Struggle of Islam in Modern Indonesia* (Nijhoff 1971) 243; H Anshari and Endang Saifuddin, *Piagam Jakarta 22 Juni 1945: Sebuah Konsensus Nasional Tentang Dasar Negara Republik Indonesia (1945–1949)* (Gema Insansi Press 1997).

by fears expressed by many (including the Japanese) that Christians in eastern Indonesia would abandon the new Republic in favour of the returning Dutch colonial forces.[45]

The shorter phrase, 'Belief in Almighty God', has therefore remained the official formulation of the first principle. As Cribb says, dropping the Seven Words was 'an act of exclusion … a device to exclude fundamental Islam from the idiom of national politics'.[46] Significantly, Pancasila uses the Indonesian term *Tuhan* (God), 'capable of encompassing Christian, Islamic, Buddhist, Hinduistic and even animistic notions of the supreme deity',[47] in place of the alternative Arabic word, *Allah*, with its Islamic connotations.

The first draft of the Preamble to the Constitution—with the Seven Words included—is known as the 'Jakarta Charter' (*Piagam Jakarta*). It became a symbol of aspirations for an alternative state based on Islamic law. Conservative Muslim groups have, at different times, called for the reinstatement of the Seven Words. Some even maintain that they were never validly deleted. In any case, the first principle as promulgated has historically been the ideological antithesis of the Islamic state widely understood as implicit in the Jakarta Charter. So, for example, debate about the basis of the state contributed to the deadlock in the *Konstituante* in the 1950s discussed above, when 43.1 per cent of *Konstituante* members supported reinstating the Jakarta Charter.[48] Their insistence that any new constitution establish a republic based on Islam was used by Soekarno to justify closing down the Konstituante and reinstating the 1945 Constitution in 1959, with Pancasila—minus the Seven Words—in its Preamble. Likewise, during the Fourth Amendment debates in 2002, the MPR rejected proposals from Muslim groups to amend Article 29 of the Constitution (which deals with religious freedom) to reintroduce a form of the Seven Words.

Indonesia is thus not an Islamic state but it is also not a secular state. The Constitutional Court made this explicit in the *Blasphemy Law* case (2009), where it emphasised that Indonesia is, instead, a 'religious state':

> [Indonesia] positions 'Almighty God' as the primary principle, and … religious values underlie the life of the nation and the state. It is not a state that separates religion and state and [it] does not follow purely individualistic or communal principles. The Indonesian Constitution does not allow campaigns pushing for freedom to have no religion, to promote 'anti-religion', or to offend or discredit religious teachings or texts which are the source of religious beliefs, or which sully the name of God.

Unfortunately, the court did not define 'religious state' or explain the nature of the religious values that underpin it.[49]

State and sovereignty

Article 1 of the amended Constitution provides that the Republic of Indonesia is a unitary state. This provision reflects the strong animus towards federalism common among Indonesia's leaders, with the failed 1949 Federal Constitution still seen as a colonial attempt

[45] Ricklefs (n 2) 246, 249; Adnan Zirfirdaus, 'Islamic Religion: Yes, Islamic Ideology: No! Islam and the State in Indonesia' in Arief Budiman (ed), *The State and Civil Society in Indonesia* (Centre of Southeast Asian Studies 1990); Deliar Noer, *The Modernist Muslim Movement in Indonesia, 1900–1942* (Oxford University Press 1973) 617–22.

[46] Cribb (n 38) 66–67.

[47] Michael Van Langenberg, 'The New Order State: Language, Ideology, Hegemony' in Arief Budiman (ed), *The State and Civil Society in Indonesia* (Centre of Southeast Asian Studies 1990) 133.

[48] Bambang M Pranowo , 'Which Islam and Which Pancasila? Islam and the State in Indonesia' in Arief Budiman (ed), *The State and Civil Society in Indonesia* (Centre of Southeast Asian Studies 1990); Zirfirdaus (n 45).

[49] Constitutional Court Decision 140/PUU-VII/2009, pp 272–74. For a discussion of the implications of this decision and the legal framework for the regulation of religion in Indonesia, see Butt and Lindsey (n 1) ch 8; Tim Lindsey and Helen Pausacker (eds), *Pluralism, Intolerance and Democratic Institutions in Indonesia* (Routledge 2016) chs 1 and 2.

to regain control over the Republic. Article 37(5) supports this, prohibiting Indonesia from taking a form other than a unitary state. This provision was intended to prevent a reversion to federalism, although legally this could be achieved easily enough by amending Articles 1 and 37(5).

Article 1 also provides that state sovereignty no longer vests in the MPR but instead is 'in the hands of the people and is exercised in accordance with the Constitution'. This somewhat vague provision is a reaction to the perception that the New Order had used the MPR as a tool of authoritarianism. It was part of the MPR's wider disempowerment that was a key theme of the post-Soeharto amendments.

The MPR

Articles 2 and 3 still acknowledge the MPR as the only institution with power to amend the Constitution. However, it no longer selects the president and vice-president, who are now chosen through a direct election, as explained below. In fact, the MPR retains only the power to inaugurate the president and vice-president and to impeach them, as also discussed below.

Article 2(1) deals with the MPR's membership and provides that it is, in effect, a joint sitting of members of the DPR and the DPD, both chosen at general elections.

The DPR

Part VII of the Constitution deals with the DPR, now Indonesia's most powerful constitutional institution. Article 19(3) requires that the DPR meet at least annually and Article 19(2) provides that its organization is to be regulated by statute, that is, by the DPR itself.

Article 19(1) of the Constitution and Article 67 of Law 17 of 2014 on the MPR, DPR, DPD, and DPRD stipulate that DPR members are to be elected at general elections.[50] In 2014, 560 seats were contested in DPR elections[51] but that was increased to 575 for the 2019 elections. Law 7 of 2017 on General Elections provides for simultaneous presidential and legislative elections (Article 167(3)) and these will take place for the first time in 2019.[52]

DPR members enjoy constitutional rights 'to ask questions, to make proposals and to give other opinions, with a right to immunity' (Article 20A(3) of the Constitution). They also have rights of 'interpellation, of enquiry, and of expressing opinions' (Article 20A(2)). Law 17 of 2014 sets out procedures for suspension, interim removal, dismissal, and replacement of DPR members.[53] Political parties can replace their members for several reasons, including death, resignation, or dismissal (Article 239(1)). There are several grounds for dismissal, including violation of the DPR Code of Ethics, continual and unexplained absence for three months or more, or conviction by a court of an offence carrying a jail term of five years or more (Article 239(2) of Law 17 of 2014).

The Constitution grants the DPR extensive authority to perform 'legislative, budgetary and oversight functions' (Article 20A(1) of the Constitution and Article 69(1) of Law 17 of 2014). Individual DPR members can introduce a bill (Article 21) but to be passed, the DPR and president must first discuss and 'jointly approve' it (Article 20(2)).[54] If not jointly approved,

[50] As amended by Law 42 of 2014 and again in 2018. At time of writing, the 2018 amendments had passed the DPR but had not been signed into law by the president.

[51] Art 21, Law 8 of 2012 on Election of Members of the DPR, DPD and DPRD; Art 76(1), Law 17 of 2014.

[52] Law 7 of 2017 on General Elections replaces and consolidates: Law 8 of 2012 on Election of Members of the DPR, DPD and DPRD; Law 15 of 2011 on the Organisation of General Elections; and Law 42 of 2008 on the Election of the President and Vice-President.

[53] Arts 239–44.

[54] See also Arts 71–72, Law 17 of 2014.

then the bill cannot be reintroduced to the house within the same session, although it may be introduced during a subsequent session (Article 20(3)). If a bill gains joint approval, the president is to ratify it (Article 20(4)). The president has thirty days from joint approval to ratify but if he or she does not do so, the bill passes into law in any case (Article 20(5)).

The DPD

Part VIIA of the Constitution covers the composition and powers of the DPD, the regional representatives assembly. Article 22C(1) of the Constitution requires its members to be elected, with each province having the same number of DPD representatives. The number of DPD members cannot exceed one-third of the DPR's (Article 22C(2)), thereby ensuring that the DPR controls the MPR. General elections for the DPD are held every five years (Article 22E). Article 22D(4) declares that DPD members can be removed from office for similar reasons and under similar procedures as those applicable to DPR members.[55]

Article 22D grants three powers to the DPD but stops short of permitting it to enact laws. First, Article 22D(1) allows it to submit bills to the DPR about:

- regional autonomy;
- relations between the central government and the regions;
- establishing, developing, and merging regions;
- management of natural and other economic resources in regional areas; and
- fiscal balance between the central government and the regions.

Second, Article 22D(2) gives the DPD power to participate in DPR debates about these regional issues, and to provide recommendations to the DPR about bills concerning the national budget, taxation, education, and religion. Third, the DPD can 'supervise the implementation' of laws relating to most of these issues,[56] and report its findings to the DPR 'as material for consideration and further action' (Article 22D(3)).

In practice, these limited powers have had little political significance, and the DPD has often been irrelevant to policy formation and implementation, even relating to regional issues. Political parties and DPD members have tried to grant the DPD legislative power to create a real bicameral system[57] but these have been repeatedly rejected by the Constitutional Court, MPR, and, of course, the DPR, which is unwilling to cede power to any other institution.

General elections

Article 22E covers elections and directs their use to elect members of the DPR, DPD, and Regional People's Representative Councils (*Dewan Perwakilan Rakyat Daerah*, DPRD), and the president and vice-president. 'Participants' (that is, candidates) in DPR and DPRD elections are political parties, whereas in DPD elections 'participants' are individuals (Article 22E(4)).[58]

[55] These conditions are set out in Arts 307–13, Law 17 of 2014.

[56] 'Matters related to the fiscal balance between the central government and the regions' are included among the areas covered by the powers to submit bills and debate in Art 22D(1) and (2) but not those covered by the supervisory and reporting power in Art 22D(3). The other powers in Art 22D(3) are probably wide enough to prevent this being a material restriction.

[57] Horowitz (n 33) 126.

[58] As mentioned, as of September 2017, there will now be 575 seats contested in a DPR election. The number of seats contested in the DPD is calculated according to the rules provided above, based on the number of DPR seats. Pursuant to Art 181(1), Law 7 of 2017 on General Elections, there are between thirty-five and 120 seats contested in each DPRD. This is an increase on the thirty-five to 100 seats provided in Art 23(1), Law 8 of 2012.

Article 22E(1) of the Constitution requires that general elections take place every five years and be organized in a 'direct, public, free, secret, honest, and fair way'. Article 22E(6) provides that general elections are to be regulated in more detail by statute, many of which have been enacted. Regional regulations and a range of other subordinate regulations—including decisions of the General Electoral Commission on technical issues—also apply to the conduct of elections.

General Electoral Commission (KPU)

Article 22E(5) states that 'general elections are to be organised by a general electoral commission that is national, permanent and independent'. Article 22E(6) adds that 'further provisions regarding general elections are to be regulated by statute'. At time of writing, this statute was Law 7 of 2017 on the Organisation of General Elections. It requires that the KPU have seven members, of whom at least 30 per cent are women (Article 10(1)(a) and (7)).[59] To appoint them, the president forms a committee team of eleven to choose a list of fourteen candidates. The DPR selects the final seven after conducting 'fit and proper' assessment of these candidates (Articles 22–25). KPU members serve a five-year term and choose the head of the KPU from among themselves (Article 10(5) and (9)). Chapter II (Articles 89–184) of Law 7 of 2017 on General Elections also establishes and regulates the Election Supervisory Board (Bawaslu, *Badan Pengawas Pemilihan Umum*), which is discussed below.

The KPU has struggled to manage elections in Indonesia, which present huge logistical challenges. Stringent financial rules introduced in response to major corruption scandals involving KPU members have made its task more complex. But the KPU has faced criticism for failing to adequately educate voters and train electoral staff, and for not maintaining a transparent vote-counting process, auditable publication of results, and accurate electoral rolls.[60] To its credit, the KPU has made considerable efforts to increase transparency in recent years. Unlike in the 2009 election, the voter list used in the 2014 elections was widely considered to be accurate, and voters could check their enrolment through an online database.[61] In the 2014 elections, the KPU scanned and uploaded so-called C1 forms to its website, which detail results from every polling station in the country. This was credited with sparking a popular movement—*Kawal Pemilu*, 'Guard the Election'—and preventing fraud during the 2014 presidential election.

The executive

The presidency

Section III of the Constitution outlines the powers of the president and vice-president. Article 4(1) states broadly that the 'President of the Republic of Indonesia is granted the power of government in accordance with the Constitution.' Whether this wide grant of governmental authority allows the president to exercise other executive powers inherent in the term 'government' is a matter of scholarly debate.[62]

[59] Provincial KPUs have between five and seven members; and city and council KPUs have between three and five (Art 10(1)(b), (c)). These numbers depend on population, geographical conditions, and the number of administrative districts (Art 10(2) and (3)).

[60] Rizal Sukma, 'Indonesian Politics in 2009: Defective Elections, Resilient Democracy' (2009) 45 *Bulletin of Indonesian Economic Studies* 317; Adam Schmidt, 'Indonesia's 2009 Elections: Performance Challenges and Negative Precedents' in Edward Aspinall and Marcus Mietzner (eds), *Problems of Democratisation in Indonesia: Elections, Institutions and Society* (ISEAS 2010) 103, 109.

[61] Rumah Pemilu, *2014 Elections in Indonesia: Final Report by Rumah Pemilu* (Rumah Pemilu 2014).

[62] Jimly Asshiddiqie, *The Constitutional Law of Indonesia: A Comprehensive Overview* (Sweet & Maxwell Asia 2009) 276.

The Constitution expressly grants the president the following specific executive powers. He or she:

- is supreme commander of the army, navy, and air force (Article 10);
- declares war and peace, with DPR approval (Article 11(1));
- enters into treaties. The president must seek DPR approval where an international agreement has 'broad and fundamental consequences for the lives of the Indonesian people, creates burdens on the state's finances, and/or requires amendments to laws or the enactment of new ones' (Article 11(2));
- declares states of emergency. This power is, however, circumscribed by statute (Article 12);
- appoints and dismisses ministers (Article 17(2));
- appoints ambassadors, after considering the views of the DPR and consuls (Article 13(1) and (2));
- accepts ambassadors from foreign countries, after considering the DPR's views (Article 13(3));
- forms a presidential advisory council (Article 16);
- awards titles, decorations, and other marks of honour, as provided for by statute (Article 15);
- inaugurates members of the State Audit Board (BPK), who are elected by the DPR, after considering the DPD's advice (Article 23F(1));
- appoints Supreme Court judges proposed by the Judicial Commission and approved by the DPR (Article 24A(3));
- appoints and dismisses members of the Judicial Commission approved by the DPR (Article 24B(3));
- appoints Constitutional Court judges, after the Supreme Court, the DPR, and the president have proposed three judges each (Article 24C(3));
- exercises powers of clemency, including: granting pardons (*grasi*) and rehabilitation (*rehabilitasi*), after considering advice from the Supreme Court (Article 14(1)); and
- grants amnesties and nullification (*abolisi*), after considering the DPR's advice (Article 14(2)).[63]

The Constitution reserves some powers for the president in the law-making process, although, as mentioned, these are now limited. Specifically, the president can:

- propose bills to the DPR (Article 5(1));
- propose a bill on the state budget to be discussed by the DPR, after considering the DPD's views (Article 23(2));
- formally ratify bills on which he or she and the DPR agree (but cannot veto bills once the DPR has passed them) (Article 20(4));
- issue government regulations to implement laws (Article 5(2)); and
- issue interim emergency laws (*peraturan pengganti undang-undang, Perpu* or *Perppu*, regulations in lieu of statute) in pressing circumstances. These have constitutional status equivalent to statutes but the DPR must approve or repeal them at its next sitting (Article 22(1) and (2)).

[63] These powers are discussed further in Chapter 12.

As mentioned, Articles 6 and 6A of the Constitution require the president and vice-president to be directly elected. Presidential and vice-presidential candidates must be Indonesian citizens from birth; never have been of another nationality of their own volition; never have betrayed their country; and be mentally and physically capable of carrying out the duties of the president or vice-president (Article 6(1)).[64]

Presidential elections are now regulated by Law 7 of 2017 on General Elections. The statute that previously governed them—Law 42 of 2008 on the General Election of the President and Vice-President[65]—was subject to several constitutional challenges.[66] In early 2014, for example, the Constitutional Court struck down provisions in the 2008 Law that allowed the presidential and vice-presidential elections to be held three months after the general legislative elections.[67] The Court found that having these elections separated by a three-month period forced presidential and vice-presidential candidates to engage in political bargaining that could adversely affect how the candidates governed, if elected.[68] This decision heralded major changes for electoral administration. It was made about six months before the 2014 elections, however, and the Court decided that this was insufficient time to prepare for so significant a change. A new regulation was therefore required to provide a legal basis for simultaneous legislative and presidential elections.[69] In 2019, the DPRD, DPD, DPR, and presidential elections will all be held on the same day for the first time.

Presidential and vice-presidential candidate pairs must be proposed by political parties; they cannot nominate themselves as 'independent' candidates. To propose a pair of presidential and vice-presidential candidates to stand for election, a party or coalition must hold at least 20 per cent of the total number of seats in the DPR or have obtained 25 per cent of the total number of valid votes in the previous general election for the DPR.[70] Article 6A(3) of the Constitution also requires that candidates then win more than 50 per cent of the vote in the presidential election across more than half of Indonesia's provinces. If that threshold is not met, then the two pairs receiving the most votes compete in a run-off (Article 6A(4)).

Impeachment

The president cannot suspend or dissolve the DPR (Article 7C) but, as mentioned, the MPR can dismiss the president or vice-president (Article 7A). To do so, a special plenary session of the DPR is first called to decide whether to ask the Constitutional Court to investigate the conduct of the president or vice-president. This is called interpolation (*interpelasi*) and requires a two-thirds majority of at least two-thirds of DPR members to pass.[71] If approved, the DPR's request is then submitted to the Constitutional Court. Pursuant to Article 7B(1) and (4), the Court must investigate and decide whether any of the conditions for dismissal

[64] Art 5, Law 42 of 2008 adds a number of other conditions for candidacy.

[65] Law 42 of 2008 replaced Law 23 of 2003 on the General Elections of the President and Vice-President (see Art 261, Law 42 of 2008).

[66] See, for example, Constitutional Court Decisions 51-52-59/PUU-VI/2008; 56/PUU-VI/2008; and 104/PUU-VII/2009.

[67] Constitutional Court Decision 14/PUU-XI/2013 revoked Arts 3(5), 12(1) and (2), 14(2), and 112.

[68] Constitutional Court Decision 14/PUU-XI/2013, p 83. The Court ruled that Art 6A(2) should be read with Art 22E(2), which states that general elections are held to elect members of the DPR, DPD, and DPRD, and the president, and vice-president, meaning that the phrase 'prior to a general election' in Art 6A(2) could not be interpreted to mean 'prior to a general election of the president and vice president'. For a discussion of this case, see Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Brill 2015).

[69] Constitutional Court Decision 14/PUU-XI/2013, pp 85–86.

[70] Art 222, Law 7 of 2017. This provision was upheld in Constitutional Court Decision 51-52-59/PUU-VI/2008.

[71] Art 7B(3), Constitution. Law 27 of 2009 sought to increase both these requirements to three-quarters (Art 184(3)) but the Constitutional Court struck this down in Decision 23-26/PUU-VIII/2010.

outlined in Article 7A have been satisfied (Article 24C(2),[72] namely: treason, corruption, or any other felony; misconduct; and no longer fulfilling the requirements of office. The Court must issue its decision within ninety days of receiving the request (Article 7B(4)).

If the Constitutional Court decides that the Article 7A conditions have been met, the DPR must next convene a further plenary session to decide whether to submit a proposal to the MPR to impeach the president or vice-president (Article 7B(5)). If the DPR submits such a proposal, then the MPR must convene a plenary session to consider it within thirty days of receipt (Article 7B(6)). A quorum of three-quarters of the MPR's membership is required (Article 7B(7)). At the MPR plenary session, the president or vice-president is given an opportunity to explain his or her conduct (Article 7B(7)). The president or vice-president can be dismissed if at least two-thirds of MPR members present support the DPR proposal (Articles 7A and 7B(7)).

The vice-president

Article 4(2) of the Constitution states that 'in exercising his or her duties, the President is assisted by a vice-president'. Under Article 8, the vice-president acts as president in the president's absence. Perhaps because the vice-president is viewed merely as an assistant to the president, the powers and duties of the vice-president are not detailed in the Constitution or, indeed, in any other law. Instead, they are left to convention.

Cabinet and ministers

The Constitution makes no mention of the cabinet but Article 17 refers to the ministers who are part of it, providing that:

(1) The president is assisted by ministers of state.
(2) Ministers are appointed and dismissed by the president.
(3) Each minister oversees certain affairs in the government.
(4) Establishment, alteration, and the dissolution of the ministries of state are governed by law.

Besides the president and ministers, the cabinet also includes so-called 'ministerial-level officials' (*pejabat setingkat menteri*), such as the military, police, and state intelligence agency chiefs, and the attorney general/prosecutor general (*Jaksa Agung*), although there is no clear regulatory basis for their inclusion.[73] The president installs the cabinet by issuing a regulation listing its members.[74]

In the past, the president had the prerogative right to appoint as many ministers as he or she wished, to dismiss them, and to determine the areas for which they were responsible. Law 39 of 2008 on State Ministries changes this, limiting the number of ministries to thirty-four and establishing criteria for the selection of ministers, among other things.[75] Article

[72] See also Regulation of the Constitutional Court 17 of 2009 on Procedural Guidelines for Disputes about the Result of the Election of the President and Vice-President.

[73] PNH Simanjuntak, *Kabinet-Kabinet Republik Indonesia Dari Awal Kermerdekaan Sampai Reformasi* (Djambatan 2003).

[74] Arts 4 and 5, Law 39 of 2008 on State Ministries. At time of writing, the cabinet had been installed by Presidential Decision 121/P of 2014 on the Establishment of Ministries and the Appointment of Ministers to the Working Cabinet for the Period 2014–2019.

[75] Specifically, they must: (a) be an Indonesian citizen; (b) fear God Almighty; (c) be loyal to Pancasila as the state ideology, the 1945 Constitution, and the ideals of the declaration of independence; (d) be physically and mentally healthy; (e) be of integrity and good character; and (f) never have been imprisoned for a criminal offence punishable by imprisonment of five years or more in a court decision that has obtained permanent legal force (Art 22(2)).

10 of the State Ministries Law also enables the president to appoint a deputy minister for specific work that requires special handling. The Elucidation to this Article adds that deputy ministers cannot be cabinet members and should be career bureaucrats. In 2011, however, the Constitutional Court struck down the latter requirement; deputy ministers may now be appointed from outside the state bureaucracy.[76]

Under Article 8(3) of the Constitution, in the event of the death, resignation, dismissal, or disability of the president and vice-president, a triumvirate of the Minister of Foreign Affairs, the Minister of Home Affairs, and the Minister of Defence exercise presidential functions until the MPR chooses a new president and vice-president to serve out the balance of the term. The MPR must do so within thirty days of the vacancy or incapacity and must choose the new leaders from:

> … two pairs of Presidential and Vice-Presidential candidates proposed by the political parties or coalitions whose … pairs received the first and second highest votes in the previous general election (Article 8(3)).

The Presidential Advisory Council (Wantimpres)

Article 16 of the Constitution provides that 'the President is to set up an advisory council, which has the task of advising the President and is to be further regulated by statute'. Under Soeharto, a Supreme Advisory Council (*Dewan Pertimbangan Agung*) operated pursuant to an earlier version of Article 16 but was rarely consulted and exercised little influence. After his fall, it was replaced by the Presidential Advisory Council (*Dewan Pertimbangan Presiden* or *Wantimpres*) in 2007. The new Council had influence on some aspects of policy formation under President Yudhoyono.

Law 19 of 2006 on the Presidential Advisory Council states that the Council is a 'government institution tasked with advising the president' in the course of his or her duties (Articles 1(1) and 4(1)). It is responsible solely to the president (Article 2), and its members must give advice to the president, whether sought or not (Article 4(2)). At the request of the president, Council members may attend cabinet meetings or accompany the president on state or working visits (Article 6(2)). Individual members or the Council as a whole can provide the advice, but it must always be kept confidential (Articles 4(3) and 6(1)). In apparent violation of this obligation, some Council members have sometimes publicly discussed advice they have given.

The Constitution is silent on Council membership, but Chapter III of the Presidential Advisory Council Law details the Council's composition and the selection process for its members. The Council comprises nine members, appointed by the president, and one chair (Articles 7(1) and 9(1)). The chair rotates among the members at the president's discretion (Article 7(2)). *Wantimpres* members must not serve in other positions while on the Council. For example, they must not lead political parties, NGOs, foundations, private or public companies, professional organizations, or private or public educational institutions (Article 12). Their term lasts for the president's term (Article 10) but the president can dismiss them earlier at his or her discretion (Article 11(1)(e)).

The judiciary

The Supreme Court (*Mahkamah Agung*) draws its constitutional authority from Articles 24 and 24A of the Constitution. Four main branches of the judicature exist under it: the general courts; the military courts; the religious courts; and the administrative courts (Article 24(2)). The general courts also house what are referred to as 'special courts', including, for example, the Fisheries Court and the Commercial Court (Article 24(3)).

[76] Constitutional Court Decision 79/PUU-IX/2011.

Article 24(1) provides that the 'judicial power is an independent power'. To that end, a raft of statutes were enacted in 2004[77] and 2009[78] to provide a legal basis for transferring control of the organizational, administrative, and financial affairs of the courts from the government to the Supreme Court—the so-called 'one roof' (*satu atap*) reforms.[79] These have had some success but Indonesia's judicial system is still dysfunctional in many respects and, in particular, continues to struggle with institutionalized corruption inherited from the Soeharto era.[80]

The Constitutional Court is entirely independent of Indonesia's other courts and is established by Article 24C of the Constitution. With nine judges, it is the court of first and final instance in the matters over which it has jurisdiction, perhaps the most important of which is determining the constitutionality of statutes passed by the DPR. It has played an important role in developing the body of constitutional interpretation that Indonesia has always lacked but in recent years it too has been damaged by corruption scandals.

The Supreme Court and the courts it supervises are discussed in more detail in Chapter 4, along with the Judicial Commission, which Article 24B of the Constitution establishes. The Constitutional Court is covered in Chapter 5.

Regional government

As mentioned, the fall of Soeharto's authoritarian and highly centralized regime led to widespread demands for decentralization, or 'regional autonomy' (*otonomi daerah*). The basic framework for Indonesia's decentralized system is provided in Article 18 of the Constitution, which states that 'Regional governments are to exercise wide-ranging autonomy, except in matters that national legislation reserves for the Central Government' (Article 18(5)). These are: foreign affairs, defence, security, justice, monetary and fiscal issues, and religion. All other matters can be regulated concurrently by central and regional governments (Article 10(1), Law 23 of 2014 on Regional Government).

Article 18(3) of the Constitution refers to Regional People's Representative Councils (DPRD), whose members are voted in by general election. Regional executives (governors, regents (*bupati*) and mayors – the heads of provinces, counties and cities respectively) are also democratically elected (Article 18(4)). All may enact regional regulations (*Peraturan daerah, Perda*) and issue decisions to exercise their autonomy (Article 18(6)).

Article 18B(1) recognizes 'special and unique' provinces, granting them greater autonomy because of their distinctive local culture and history.[81] Aceh,[82] Papua,[83] Jakarta,[84] and Yogyakarta[85] currently enjoy this 'special region' status.

In Chapter 3, we show that statues enacted in 2004 and 2014 on regional government[86] have progressively narrowed the broad grant of power in Article 18. We also demonstrate

[77] Law 4 of 2004 on Judicial Power, which replaced a 1970 Law with the same title and subject matter; Law 5 of 2004, which amended Law 14 of 1985 on the Supreme Court; Law 8 of 2004, which significantly amended the General Courts Law (Law 2 of 1986); and Law 9 of 2004, which amended Law 5 of 1986 on the Administrative Courts.

[78] Law 48 of 2009 on Judicial Power, Law 3 of 2009 on the Supreme Court, Law 49 of 2009 on the General Courts, Law 50 of 2009 on the Religious Courts, and Law 51 of 2009 on the Administrative Courts.

[79] Lindsey (n 42) 273–77.

[80] S Butt and Tim Lindsey, 'Judicial Mafia: The Courts and State Illegality in Indonesia' in G Van Klinken and Edward Aspinall (eds), *The State and Illegality in Indonesia* (KITLV Press 2010).

[81] Richard Miller Bird, *Fiscal Fragmentation in Decentralized Countries: Subsidiarity, Solidarity and Asymmetry* (Edward Elgar Publishing 2007) 354.

[82] Law 44 of 1999 on the Implementation of the Special Status of the Special Province of Aceh.

[83] Law 21 of 2001 on Special Autonomy for the Province of Papua.

[84] Law 29 of 2007 on the Government of the Special Capital Province of Jakarta as the Capital of the Unitary State of the Republic of Indonesia.

[85] Law 13 of 2012 on the Special Province of Yogyakarta.

[86] Law 32 of 2004 on Regional Government; and Law 23 of 2014 on Regional Government.

that the system of regional government these statutes has created has produced inordinately complex and unreliable results in legal terms. In fact, this, and legal sector corruption, are the main causes of legal uncertainty in Indonesia today.

Traditional communities and adat

Article 28I(3) of the Constitution states that 'The cultural identity and rights of traditional communities are to be respected in line with the development of the times and civilisation'. More specifically, Article 18B(2) requires the state to recognize and respect customary law (*adat*) communities and their traditional rights, provided they meet various requirements. Article 18B(2) appears under the heading 'Regional Government', suggesting the Constitution links adat and local autonomy,[87] and implying that adat recognition is part of the broader regional empowerment objective.

In Chapter 7, we show that some regional governments have now formally re-established traditional governance structures and adat rights that were suppressed during the Soeharto period. However, while adat rights are mentioned in many natural resources laws enacted after 1999, they must be formally recognized by state law to be protected in practice.[88] They are therefore still easily ignored, leaving many traditional communities susceptible to continuing exploitation and struggling to retain their lands.

Law and security

The Indonesian Military (TNI)

The New Order was led by Soeharto, a general who rose to power in the mid-sixties on the back of military-backed killings and the imprisonment of hundreds of thousands of political opponents.[89] His regime relied heavily upon the armed forces for political support and social control, which was legitimized by the so-called *dwifungsi* (dual function) doctrine. This held that the military's role in Indonesia's independence struggle against the Dutch justified it exercising ongoing socio-political functions in addition to its defence function, as the guardian of national unity. For three decades, this doctrine helped the army occupy a position at the centre of public life. It had guaranteed seats in the DPR and MPR and an institutionalized presence in most state agencies and the wider community, down to the village level. It was also actively involved in business, developing extensive commercial interests.

Soeharto's fall in 1998 came with revelations of the extent to which the military had been complicit in corruption, state violence, and private criminality—all with virtual impunity. These issues came to a head in the MPR Session in 2000 where, for the first time in decades, the role of the military was challenged by legislators as they picked *dwifungsi* apart to assert civilian control. Some of the most important reforms they introduced appear in Article 30(1) and (2) of the Constitution, which creates a distinction between external defence and internal security. The former remains the responsibility of the TNI (*Tentara Nasional Indonesia*, Indonesian military). The latter—comprising internal security, law enforcement, and maintenance of public order—was handed to the Indonesian Police Force or Polri (*Polisi Republik Indonesia*), separated from the military to form a civilian

[87] Gary F Bell, 'Indonesia: The Challenges of Legal Diversity and Law Reform' in E Ann Black and Gary F Bell (eds), *Law and Legal Institutions of Asia: Traditions, Adaptations and Innovations* (Cambridge University Press 2011).

[88] Art 1(43), 2014 Regional Autonomy Law; Arts 97 and 103, Law 6 of 2014 on Villages.

[89] This section draws on Timothy Lindsey, 'Constitutional Reform in Indonesia: Muddling towards Democracy' in Timothy Lindsey (ed), *Indonesia: Law and Society* (2nd edn, Federation Press 2008).

organization. Article 30(5) also handed the power to regulate the respective authority and jurisdiction of TNI and Polri to the DPR.

Further reforms were introduced by the Fourth Amendment in 2002. As mentioned, under Soeharto, Indonesia's sovereign body was the MPR, and its members comprised both elected members and appointees, with the latter including representatives of the armed forces. In return for this guaranteed representation, members of the armed forces could not vote. When the armed forces lost this automatic representation in the MPR by the amendment of Article 2 of the Constitution, military personnel were given the right to vote.

Other fundamental changes aimed at dismantling *dwifungsi* were effected by MPR decisions and DPR statutes rather than constitutional amendments.[90] The DPR, rather than the president, now appoints and dismisses the TNI commander. The armed forces (police fully, military in part) are now subject to the civil and criminal jurisdiction of the general courts. Previously, the military courts (*Pengadilan Militer*) had tired military officers, even in cases that were clearly unrelated to their military functions. These courts, notorious for whitewashing military crime, retained a reduced jurisdiction, as discussed in Chapter 4.

Likewise, Law 34 of 2004 on the TNI emphasized that the military was to be neutral in politics and prohibited its involvement in business (Article 2(d)). In practice, however, the unravelling of the military's vast business networks has taken time and is not complete. It did not really even begin until Presidential Regulation 43 of 2009 on the Takeover of TNI's Business Activities established a special team to oversee it.

Finally, while *dwifungsi* may be gone, it is not entirely forgotten. Article 30 of the Constitution explicitly recognizes the army's 'total people's defence system' (*sishankamrata*)[91] doctrine. Derived from the revolutionary experience of guerrilla war, this places an obligation on citizens to support the army in its national defence and security roles. This provision could conceivably one day provide a constitutional platform for a return of a form of *dwifungsi*.

The Indonesian National Police (Polri)

Under Article 30(4) of the 1945 Constitution, the police are an instrument of the state that safeguards community security and order, by protecting, sheltering, and serving the community, and upholding the law. The police are responsible and accountable to the president as the head of the state (Article 8(1) and (2), Law 2 of 2002 on Police). The president appoints and dismisses the chief of police, with DPR approval (Article 11(1)).

The separation of the police from the military brought its own problems. Under Soeharto, the police, like the military, engaged in political and business activities, with some of the proceeds used to supplement insufficient budgets from the government to fund police operations.[92] Post *dwifungsi*, this was not possible—at least on a large scale—and the police force now suffers from reduced funding and resources. The severance also created an intense rivalry with the armed forces that sometimes lapses into violence, as the police and military compete for scarce resources and, in some cases, control of criminal activities.

[90] See, for example, MPR Decision VI/MPR/2000 on the Separation of the National Armed Forces and the Police of the Republic of Indonesia.

[91] *Sistem pertahanan keamanan rakyat semesta*.

[92] See also Art 5, Government Regulation 2 of 2003 on National Police Discipline Regulations, which confirms that business activities are no longer permitted.

Police Commission

Article 37(1) of the Police Law establishes the National Police Commission (*Komisi Polisi Nasional*, or *Kompolnas*).[93] This is intended to assist the president in determining policing policy and advises him or her on the appointment and dismissal of the chief of police (Article 38(1)). It has nine members—three each representing government, police experts, and community leaders—who the president appoints and dismisses.[94] Like the Prosecution Commission, discussed below, this commission does not appear to have significantly improved standards or behaviour.

Human rights

Articles 28A to J of the Constitution contain an extensive list of human rights. These are drawn from the UDHR and are described in detail in Chapter 13. Most of these rights are, however, subject to Article 28J(2), which permits them to be limited by national statutes directed at 'protecting the rights and freedoms of others and which accord with moral considerations, religious values, security and public order in a democratic society'. As discussed in Chapter 13, the Constitutional Court has regularly used Article 28J(2) to justify refusing to invalidate statutes that breach constitutional rights.

The drafters of the second amendment seem to have intended that some rights would be non-derogable. Article 28I(1) states:

> The right to life, the right to not be tortured, the right to freedom of thought and conscience, the right to religion, the right to not be enslaved, the right to be recognised as an individual before the law, and the right to not be prosecuted under a law of retrospective application are human rights that cannot be limited under any circumstances.

On a plain reading, these particular rights appear intended to be absolute, that is, Article 28J(2) cannot be used to justify legislation that limits them. Despite this, the Constitutional Court has often held that Article 28I(1) rights are, in fact, subject to Article 28J(2).[95] In other words, the Court has allowed statutes to remain in force even though they breach the human rights of citizens, including 'absolute' Article 28I(1) rights, if the statute, first, upholds the rights of others and, second, satisfies one of the purposes of Article 28J(2), such as religious values or public order. Thus, *all* human rights conferred by Articles 28A to J should be understood as contingent, in the sense that they can now be constrained by the legislature.

Finance

The State Audit Board

Article 23E(1) of the Constitution establishes the State Audit Board (*Badan Pemeriksaan Keuangan*, BPK) to manage and monitor the state's finances. It complements the Soeharto-era auditing institution, the Finance and Development Audit Agency *(Badan Pengawasan Keuangan dan Pembangunan*, BPKP), an internal audit body discussed below that was subordinate to government and so has historically been ineffective.

In contrast, BPK is independent and its members are chosen by the DPR, after considering the DPD's advice, and approved by the president (Article 23F(1)). The results of BPK audits are submitted to the DPR, DPD, and any relevant DPRD (Article 23E(2)).

[93] Art 37(1), Law 2 of 2002 on the Police.
[94] Arts 14, 15, and 16, Presidential Regulation 17 of 2011 on the National Police Commission.
[95] Butt and Lindsey (n 1); Butt (n 68).

Bank Indonesia

Article 23D of the Constitution deals with Bank Indonesia, the country's central bank, which was established by Government Regulation 2 of 1946 and is primarily regulated by Law 23 of 1999 on Bank Indonesia (as amended).[96] As an independent state institution, it is to be free from government or other interference (Article 4(2), Bank Indonesia Law) and is charged with maintaining the stability of the rupiah (Article 7). Its core functions are to: prescribe and implement monetary policy (including setting interest rates); regulate and safeguard the finance system; and regulate and supervise banks (Article 8).

As we show in Chapter 19, Bank Indonesia previously exercised a range of other functions relating to bank and other financial institution licensing and supervision, but the Financial Services Authority (*Otoritas Jasa Keuangan*), discussed below, now exercises most of them.

EXTRA-CONSTITUTIONAL STATE AGENCIES

In this section, we describe institutions that play an important role in Indonesia's state system but are not established by the Constitution. There have been calls for some of them—including the Corruption Eradication Commission, the Ombudsman, and the National Human Rights Commission (Komnas HAM)—to have their existence entrenched and powers confirmed by inclusion in the Constitution. There is, however, little support among politicians for further constitutional amendments. They seem very reluctant to renew the heated political debates sparked by the 1999–2002 amendments.

The Executive

The Presidential Staff Office

The Presidential Staff Office supports the president and vice-president in relation to national priority programs, political communication, and the management of strategic issues (Articles 2 and 3, Presidential Regulation 26 of 2015 on the Presidential Staff Office). The Office is directly responsible to the president (Article 1(2)) and is led by a head with ministerial-level status (Articles 1(3) and 22). The head is appointed and dismissed by the president (Article 15(1)), and his or her term matches the president's (Article 16(1)).

Cabinet Secretariat

Articles 1(1) and 2 of Presidential Regulation 25 of 2015 on the Cabinet Secretariat (*Sekretariat Kabinet*, Setkab) provide that the Secretariat is responsible to the president and supports him or her by managing the cabinet.[97] The Secretariat helps formulate and analyse government policies and programmes, and supervises the implementation of government policies and programmes relating to politics, law, security, economics, human development, culture, and maritime affairs (Article 3). The Cabinet Secretariat also manages conferences and meetings chaired or attended by the president or vice-president (Article 3(e)).

The Cabinet Secretariat is headed by a secretary with ministerial-level status (Article 57), who is appointed and dismissed by the president (Article 56(1)). The cabinet secretary is assisted by a vice cabinet secretary, a deputy, and expert staff, all of whom are appointed and dismissed by the president on the secretary's recommendation (Articles 56(2) and 57).

[96] Law 23 of 1999 on Bank Indonesia has been amended by Law 3 of 2004, and Law 6 of 2009 on the Adoption of Interim Emergency Law 2 of 2008 on the Amendment of Law 23 of 1999.

[97] Art 2, Presidential Regulation 25 of 2015 on the Cabinet Secretariat.

As Linnan argues, the cabinet secretary has been:

> … very important within Indonesian government because [he or she] serves an analogous function to the White House chief of staff within the US government, or the chief secretary to the prime minister within a parliamentary system … [He or she] advises the President on practically all legislation.[98]

State administration

Election Supervisory Board

As mentioned, Law 7 of 2017 on General Elections regulates the Election Supervisory Board (Bawaslu, *Badan Pengawas Pemilihan Umum*). Under prior legislation,[99] Bawaslu was a permanent body at the national and provincial levels but only an ad hoc institution at the county/city level, established when preparations for general elections commenced and disbanded when winners were inaugurated. Under Law 7 of 2017, Bawaslu is permanent at the national, provincial, and county/city levels, and an ad hoc institution at the sub-district level and below (Articles 89(4)(5) and 90). Bawaslu supervises the General Election Commission (KPU) and the electoral process, paying attention to matters like electoral corruption and the neutrality of security forces (Article 93). There is a history of animosity between the KPU and Bawaslu, exacerbated by widespread allegations of corruption and incompetence.[100]

Despite its large budget, *Bawaslu* has been criticized for being largely toothless.[101] In the 2014 elections, for example, it reportedly followed up just ten per cent of complaints it received.[102] Part of the problem is that Bawaslu depends on police and prosecutors to act when it finds criminal conduct. In 2013, Bawaslu, police, and prosecutors signed a memorandum of understanding on the establishment of a Coordinated Law Enforcement Centre (*Sentra Penegakan Hukum Terpadu, Gakkumdu*). The 2017 Elections Law formalizes this body (Article 486). The Centre did not appear to improve enforcement for the 2014 elections and it is unclear whether enforcement will improve in 2019.

The National Development Planning Agency

Articles 1(1) and 2 of Presidential Regulation 66 of 2015 on the National Development Planning Agency (*Badan Perencanaan Pembangunan Nasional*, Bappenas) provide that this agency is non-ministerial, responsible to the president, and performs government duties in the field of national development planning.[103] Under Article 32(4) of Law 25 of 2004 on the National Development Planning System,[104] Bappenas is headed by the Minister of National Development Planning and is linked with Regional Development Planning Agencies (Bappeda) located at the provincial and county/city levels.

Under Soeharto, Bappenas had sweeping responsibility for law reform at the programme level, and was far more powerful than today.[105] Article 3 of Presidential Regulation 66 of 2015 provides that its functions are now chiefly policy formulation, development planning, budget preparation, and monitoring and evaluation of development activities.

[98] David Linnan, 'Indonesian Law Reform, or Once More Unto the Breach: A Brief Institutional History' in Timothy Lindsey and Drew Duncan (eds), *Prospects for Reform in Post-Soeharto Indonesia* (Centre for Asia Pacific Initiatives, University of Victoria 1999).

[99] Law 15 of 2011 on Organisation of Elections.

[100] Schmidt (n 60) 104.

[101] Marcus Mietzner, *Money, Power, and Ideology: Political Parties in Post-Authoritarian Indonesia* (NUS Press 2013) 232.

[102] Hans Nicholas Jong, 'Bawaslu under Fire for Lack of Follow up' *Jakarta Post* (14 November 2014).

[103] See also Law 25 of 2004 on the National Development Planning System.

[104] See also Art 6, Government Regulation 66 of 2015.

[105] Linnan (n 98).

National Land Agency

The National Land Agency (*Badan Pertanahan Nasional*, BPN) is a non-ministerial government agency responsible to the president for governance in the land sector (Article 1, Presidential Regulation 20 of 2015 on the National Land Agency). BPN is chaired by the Minister of Agriculture and Spatial Planning (Article 5(a)),[106] and its strategic functions include: preparing and establishing land policy, including land surveys, mapping rights, registration and acquisition; community development; and managing land disputes and cases (Articles 3(a)–(e)).

BPN has long been considered unprofessional and, as we show in Chapter 8, has been unable to deliver a reliable and transparent land titling system.

The National Civil Service Commission

The National Civil Service Commission (*Komisi Aparatur Sipil Negara*) is an independent agency, established by Law 5 of 2014 on the Civil Service, that supervises the state civil service, including government agencies (Article 30).[107] In particular, it monitors the appointment of senior members of the bureaucracy and the application of civil service codes of conduct (Article 32(1)).

The Commission consists of a chair, a vice-chair, and five members chosen from government and non-governmental sectors (Articles 35(1) and 38(1)). They are selected by the president for a maximum of two five-year terms (Articles 39(5) and 40(2)) from candidates nominated by a team formed by the Minister of Civil Service Reform (Article 39(1)).

The State Personnel Agency

According to Article 1 of Presidential Decision 58 of 2013, the State Personnel Agency (*Badan Kepegawaian Negara*, BKN) is a non-ministerial government agency responsible to the president but coordinated by ministers whose portfolios relate to civil service and bureaucracy reform. BKN prepares and adopts personnel management policy; and procures, transfers, dismisses and administers the retirement of civil servants (Article 3(a) and (b)).

Law 5 of 2014 on the Civil Service empowers BKN to help manage the civil service, including by approving promotions and retirements; and storing personnel information (Article 47).

The head of BKN is appointed and dismissed by the president on the recommendation of the minister responsible for the civil service and bureaucracy reform (Article 41, Presidential Decision 58 of 2013). The head is supported by a vice head, a chief secretary, and a deputy who are appointed and dismissed by the president upon the recommendation of the minister, based on the advice of the head of BKN (Article 42(1), Presidential Decision 58 of 2013).

Central Bureau of Statistics

The Central Bureau of Statistics (*Badan Pusat Statistik*, BPS) was established under Law 16 of 1997 on Statistics and is directly responsible to the president (Article 28(1)–(2)). Its tasks include: assessing, preparing and formulating policies relating to statistics; coordinating

[106] The Minister of Agriculture and Spatial Planning is one of only two ministers heading non-ministerial government institutions who are mentioned explicitly in the current presidential decision establishing the Cabinet. The other is the Minister of National Development Planning, who is also Head of Bappenas (Presidential Decision 121/P of 2014 on the Establishment of the Work Cabinet Ministries for the Period 2014–2019).

[107] See also Presidential Decision 118 of 2014 on Secretariat, Systems and Human Resources Management, Work Procedures, and Responsibility and Financial Management Reform of the Civil Service Commission.

national and regional statistical activities; establishing and operating basic statistics activities; establishing national statistical systems; and facilitating the statistical activities of government agencies (Article 32).

The Ombudsman

The Ombudsman Commission was established by Presidential Decision 44 of 2000 and later as a statutory authority by Law 37 of 2008 on the Ombudsman. It has authority to investigate complaints about public services and allegations of maladministration, including judicial impropriety (Article 7, Ombudsman Law). In 2016, it received more than 9,000 complaints, mostly about the police and land and education issues.[108] It consists of a chairperson, a vice-chairperson, and seven members selected by the DPR from candidates nominated by the president (Articles 11(1) and 14). They hold office for a maximum of two five-year terms (Article 17).

The Ombudsman can: formally request reports from impugned government institutions; examine documents held by a complainant or respondent to verify the truth of allegations and complaints; call complainants or respondents for interview; resolve complaints through mediation and conciliation; make recommendations, including that compensation be paid; and publicize findings and recommendations, if in the public interest (Article 8). To improve public services, the Ombudsman can make recommendations to the president, regional heads of government, and other government leaders. It can also suggest regulatory reform to prevent maladministration (Article 8).

The Ombudsman's main limitation is its inability to compel government officials and departments to respond to its inquiries and recommendations. The 2008 Law did not give it coercive powers and many officials ignore the Ombudsman's requests and findings. For the most part, the Ombudsman can only attempt to 'shame' officials and government departments through the media and hope that they remedy the problem.[109]

Law and security

The public prosecution and the prosecutor general/attorney general

The *Jaksa Agung* is both prosecutor general and attorney general, and heads the public prosecution service. Neither the *Jaksa Agung* nor the service are mentioned in the Constitution but they are said to derive their authority, albeit indirectly, through Article 24(3), which provides that: 'Other government agencies whose functions relate to judicial authority are further regulated by statute'. Article 38(1) of Law 48 of 2009 on Judicial Power also refers to 'other agencies whose functions relate to judicial power'. Its elucidation adds that: 'What is meant by "other agencies" are, among others, the police, prosecutors, lawyers, and correctional institutions'.

Law 15 of 1961 on the Prosecution Service[110] established the prosecution as an independent institution, separating it from the Ministry of Justice and the Supreme Court. This is confirmed by Article 2(1)–(2) of Law 16 of 2004 on the Prosecution Service, which provides that the prosecution service independently exercises the state's power to prosecute, along with other powers granted by statute.

[108] Ombudsman Republik Indonesia, *Laporan Tahunan 2016* (Ombudsman Republik Indonesia 2017).

[109] Stephen Sherlock, 'Combating Corruption in Indonesia? The Ombudsman and the Assets Auditing Commission' (2002) 38 *Bulletin of Indonesian Economic Studies* 367.

[110] The Law was originally enacted as Presidential Decision 204 of 1960 but was converted to a statute a year later: 'Sejarah Kejaksaan' (*Kejaksaan Tinggi Sulawesi Utara*, 2016) <http://kejati-suljut.go.id/tentangmenu/sejarahkejaksaan>.

The *Jaksa Agung* is appointed and dismissed by the president (Article 19(2), Law 16 of 2004) and is assisted by a deputy and several vice prosecutor generals, who may be appointed from outside the prosecutor's office (Article 18(2)). As mentioned, the prosecutor general is also a ministerial-level official and thus sits in cabinet alongside the armed forces head, the police chief, and the State Intelligence Agency head.[111] The prosecutor general has national jurisdiction and oversees a hierarchy of prosecutors at the provincial, city, and county levels, who have authority to prosecute in the regions in which they are located (Article 4).

The prosecution service is widely regarded as corrupt, inefficient, and resistant to reform. Much of its dysfunction has been attributed to being a source of illicit rents and state political enforcer under Soeharto, facilitating use of the criminal process to silence or intimidate the government's enemies.[112] However, a genuine structural impediment to its reform has been the merging of the functions of the government's chief lawyer (the attorney general), essentially a political role, with those of the public prosecutor (the prosecutor general), who should be fully independent to be effective. This confusion of roles and authority has meant that political skills are often institutionally more favoured than technical ones, so that many prosecutors—particularly at the local levels—lack basic legal skills. The conflation of roles can also make it hard for the prosecution service to effectively prosecute prominent members of the political elite and those associated with them.

The Prosecution Commission

The Prosecution Commission was established in 2005 to supervise, monitor, and evaluate the performance and behaviour of prosecutors and other staff, in the course of official duties and otherwise.[113] The Commission also monitors and assesses the working procedures, facilities and infrastructure, and human resources of the service.[114] Articles 2 and 3 of Presidential Regulation 18 of 2011 on the Prosecution Commission make the Commission responsible to the president but independent in carrying out its duties and exercising its powers. This Commission's members include three government representatives (not necessarily drawn from government institutions) and six community representatives (practitioners, legal academics, community leaders, and experts on the prosecution service) (Article 15).

The Prosecution Commission is housed in the office of the prosecutor general. This 'embedding' is widely seen as compromising the commission's independence, and constrains its capacity to operate effectively.[115]

The National Counter Terrorism Agency

Article 1 of Presidential Regulation 46 of 2010[116] establishes the National Counter Terrorism Agency (*Badan Nasional Penanggulangan Terorisme,* BNPT) as a government

[111] Denny Indrayana, 'Kemerdekaan Jaksa Agung Non-Kabinet' *Seputar Indonesia* (17 July 2010).

[112] Spencer Zifcak, 'But a Shadow of Justice: Political Trials in Indonesia' in Tim Lindsey (ed), *Indonesia: Law and Society* (1st edn, Federation Press 1999).

[113] The legal basis for its establishment was Art 38, Law 16 of 2004 on the Prosecution Service, which states: 'To improve the performance of the prosecution service, the President can form a commission, the structure and authorities of which are regulated by the President'.

[114] See also Art 3, Presidential Regulation 18 of 2011 on the Prosecution Commission.

[115] Abraham Utama, 'Akhir Periode Kedua, Kinerja Komisi Kejaksaan Dipertanyakan' *CNN Indonesia* (30 March 2015) <https://www.cnnindonesia.com/nasional/20150329173614-12-42797/akhir-periode-kedua-kinerja-komisi-kejaksaan-dipertanyakan/>; 'Kinerja Komisi Kejaksaan Dinilai Memprihatinkan' *Hukumonline* (12 February 2015) <http://www.hukumonline.com/berita/baca/lt54dc5ce3dffa1/kinerja-komisi-kejaksaan-dinilai-memprihatinkan>.

[116] As amended by Presidential Regulation 12 of 2012.

agency responsible to the president but under the effective authority of the Coordinating Minister for Politics, Law, and Security. Its functions include: formulating national counter-terrorism policy; coordinating government agencies vis-à-vis counter-terrorism policy; and establishing task forces (Article 2).

In the case of a terrorist attack, BNPT becomes a 'Crisis Control Centre' through which the president establishes policy and crisis management measures, including deployment of resources to combat terrorism (Article 4).

The head of BNPT has ministerial-level status and is appointed and dismissed by the president. The position can be held by a non-civil servant (Article 40).

The National Narcotics Agency

The principal law enforcement agency for drug control, the National Narcotics Agency (*Badan Narkotika Nasional*, BNN) was created by presidential regulation in 2007.[117] It is independent of government ministries and directly accountable to the president, subject to coordination by the chief of police (Article 1(1), Presidential Regulation 23 of 2010 on BNN). The head of BNN is appointed and dismissed by the president (Article 68(1), Law 35 of 2009 on Narcotics) and is assisted by a chief secretary and five deputies – one each for prevention, eradication, rehabilitation, law and cooperation, and community empowerment (Article 67, Narcotics Law; Article 5, Presidential Regulation 23 of 2010). BNN has offices in thirty-three provinces and over 100 cities and counties, and plans to progressively increase its regional representation.[118]

The Narcotics Law authorizes BNN to: formulate and implement national policies on the prevention and eradication of narcotics; eradicate the abuse of, and illicit traffic in, narcotics; and improve the capacity of medical and social rehabilitation institutions for addicts (Article 70). BNN officers have the preliminary and primary investigation powers enjoyed by the police under the Criminal Procedure Code (KUHAP).[119] Article 75 of the Narcotics Law grants specific powers to BNN officers investigating narcotics crimes.

Although President Joko Widodo often claims that drug trafficking in Indonesia has become a national emergency, BNN remains a relatively weak organization that relies heavily on the police and the public prosecution service.[120] To mitigate this, BNN signed a Memorandum of Understanding with the police to more effectively coordinate the enforcement of drug law throughout the archipelago, including by developing a national drug crime database, exchanging information, and coordinating on money laundering and precursor chemical control.[121]

The Corruption Eradication Commission

The Corruption Eradication Commission (*Komisi Pemberantasan Korupsi*, KPK) was established in 2003. The KPK investigates and prosecutes corruption cases, monitors government agencies, and coordinates and supervises anti-corruption institutions (Article 6, Law 30 of 2002 on the KPK). It has proved an effective and committed agency and, as a

[117] Presidential Regulation 83 of 2007 regarding the National Narcotics Agency, Provincial Narcotics Agencies and Regency/City Narcotics Agencies.

[118] 'Sejarah BNN' (*BNN*, 23 November 2010) <http://www.bnn.go.id/portal/index.php/konten/detail/bnn-pusat/profil/8005/sejarah-bnn>.

[119] Discussed in detail in Chapters 11 and 12.

[120] 'Jokowi: Indonesia Darurat Narkoba' *Kompas* (20 January 2015) <http://regional.kompas.com/read/2015/01/20/19405801/Jokowi.Indonesia.Darurat.Narkoba>.

[121] BNN, 'Penandatangan Nota Kesepahaman Antara Badan Narkotika Nasional (BNN) dengan Korps Lalu Lintas Polri' (2012) *Press Release* <http://www.bnn.go.id/portal/index.php/konten/detail/humas/pressrelease/10152/penandatangan-nota-kesepahaman-antara-badan-narkotika-nasional-bnn-dengan-korps-lalu-lintas-korlantas-polri>.

result, has faced repeated and sometimes elaborate efforts by members of the police and political elite to undermine its reputation, render it toothless as a law enforcer, or even destroy it entirely. The KPK and anti-corruption law in general is discussed in more detail in Chapter 14.

Witness and Victim Protection Agency

The Witness and Victim Protection Agency (*Lembaga Perlindungan Saksi dan Korban*, LPSK) is an independent government agency established in 2006 to protect witnesses and victims of crimes during criminal investigations (Article 1(5) of Law 31 of 2014 on the Protection of Witnesses and Victims).[122] The LPSK is responsible to the president but must report at least annually to the DPR (Article 13(1)–(2)). It comprises seven members, including a chair and six deputies (Article 16(1)), who are appointed by the president and the DPR for five-year terms, renewable once (Articles 15 and 23(1)).[123]

The LPSK provides safe houses, medical and psychological services, and legal assistance (Article 11) but is hampered by budgetary constraints.[124] It has complained that it receives few public requests for protection, and that collaboration with other state agencies, such as the KPK, remains weak.[125]

State Intelligence Agency

The State Intelligence Agency (*Badan Intelijen Negara*, BIN) is responsible for domestic and foreign intelligence (Article 10(1), Law 17 of 2011 on State Intelligence). Article 28(2) empowers it to coordinate the activities of military, police, the prosecution service, intelligence agencies, ministries and government agencies. BIN is accountable to the president (Article 27) and its head, who enjoys status equivalent to a minister,[126] is appointed and dismissed by the president after hearing the DPR's opinion (Article 36(1)).

BIN is a powerful agency, with authority to conduct wiretaps, monitor the flow of funds, and extract information (Article 31). In theory, it can only use these powers against groups whose activities: threaten the national interest and security; or relate to acts of terrorism, separatism, espionage, and sabotage that threaten safety, security, and national sovereignty. In practice, however, BIN interprets these two categories widely and is, therefore, seen by many as a potential threat to the rights of citizens.

State Cyber and Encryption Agency

In May 2017, President Joko Widodo established the State Cyber and Encryption Agency (*Badan Siber dan Sandi Negara*, BSSN), a non-ministerial government institution responsible to the president, subject to coordination by the Coordinating Minister for Politics, Law and Security (Article 1(1)–(2)). It takes over the functions of the previous State Encryption

[122] This Law amended Law 13 of 2006.

[123] See also Presidential Regulation 30 of 2009 on Procedures for Appointment and Dismissal of Members of LPSK.

[124] Indra Wijaya, 'LPSK Keluhkan Minimnya Anggaran 2014' *Tempo* (27 December 2013) <http://www.tempo.co/read/news/2013/12/27/078540529/LPSK-Keluhkan-Minimnya-Anggaran-2014>; 'LPSK Minta Dukungan Anggaran ke Presiden Joko Widodo' *Hukumonline* (11 July 2017) <http://www.hukumonline.com/berita/baca/lt5964d23b479e1/lpsk-minta-dukungan-anggaran-ke-presiden-joko-widodo>.

[125] 'LPSK: Permohonan Perlindungan Dari Jabodetabek Masih Minim' *Hukumonline* (29 July 2017) <http://www.hukumonline.com/berita/baca/lt597c0b7d4480e/lpsk--permohonan-perlindungan-dari-jabodetabek-masih-minim>; Widian Vebriyanto, 'KPK Offside, Lindungi Banyak Saksi Tanpa Koordinasi LPSK' *rmlo.co* (28 August 2017) <http://politik.rmol.co/read/2017/08/28/304774/KPK-Offside,-Lindungi-Banyak-Saksi-Tanpa-Koordinasi-LPSK->.

[126] Art 55, Presidential Regulation 90 of 2012 on BIN.

Institution (*Lembaga Sandi Negara* or *Lemsaneg*) and the Directorate for Information Security at the Ministry of Communication and Information (Articles 2, 51–53). It consists of a head, secretary, and four deputies – one each for detection and identification, observation and control, protection, and countermeasures and recovery (Article 4). The BSSN head is appointed and dismissed by the president on the recommendation of the Coordinating Minister for Politics, Law and Security (Article 46).

The main functions of the BSSN are formulating and implementing policy about e-commerce, coding, filtering, cyber-diplomacy, cyber crisis management, cyber information, preventing vulnerability, and addressing cyber incidents or attacks (Article 3).

Human rights

The National Human Rights Commission

The National Human Rights Commission (*Komisi Nasional Hak Asasi Manusia*, Komnas HAM) was established by Soeharto in 1993 by Presidential Decision 50 of that year, as a sop to international criticism of his regime's poor human rights record. Initially, its mandate was modest: to disseminate information about human rights; make recommendations to the government about ratifying United Nations human rights instruments; investigate the implementation of human rights and report its findings to the government; and engage in regional and international cooperation on human rights (Article 5).

Laws enacted in 1999 and 2000 gave Komnas HAM a statutory basis and expanded its powers to: conducting investigations into alleged human rights abuses, including gross human rights violations; calling witnesses and victims to give evidence; making formal submissions to government and the national legislature about human rights breaches; and helping to settle human rights disputes.[127] Despite these reforms, Komnas HAM's powers remain limited. If it identifies violations, it cannot initiate criminal action against perpetrators. For this, Komnas HAM relies upon the police, to whom it must present the evidence it obtains. The police, however, are not required to pursue cases reported by Komnas HAM. Often they do nothing. Likewise, some military officers have ignored Komnas HAM's calls to present themselves for questioning, and the courts have refused to compel them to attend.

The Commission can have up to thirty-five members, who are selected by the DPR from candidates nominated by Komnas HAM itself (Article 83(1), Law 39 of 1999 on Human Rights). It is headed by a chair and two vice chairs (Article 83(2)) elected by and from the members (Article 83(3)). They serve a five-year term that can be renewed once (Article 83(4)).

The National Commission on Violence Against Women

The National Commission on Violence Against Women (*Komisi Nasional Anti Kekerasan Terhadap Perempuan, Komnas Perempuan*) was established to tackle violence (Article 1, Presidential Regulation 65 of 2005 on Komnas Perempuan) but has actively advocated for women's rights more generally. Its tasks include: promoting understanding of all forms of violence against women; researching various laws and regulations and relevant international instruments for protecting women's human rights; fact-finding and documentation; providing recommendations to government, the legislature and the judiciary, and civil society organizations to encourage the formulation and ratification of the laws and policies that support efforts to prevent violence against women; and developing regional and international cooperation to improve efforts to prevent violence against women (Article 4).

[127] Chapter VII, Law 39 of 1999 on Human Rights; Arts 18–20, Law 26 of 2000 on the Human Rights Courts.

Komnas Perempuan is led by a plenary commission consisting of a chair, up to two deputies and no more than nineteen members (Articles 6, 8, and 9).

The Indonesian Child Protection Commission

The Indonesian Child Protection Commission (*Komisi Perlindungan Anak Indonesia*) is an independent agency established under Law 23 of 2002 on Child Protection.[128] Under Article 76, the Commission supervises child protection and collects data, receives complaints and reports to the president about it.

The commission comprises a chair, one deputy, and seven members (Article 75(1)) who consist of government, religious and community leaders; community groups, business people; and groups concerned about child protection (Article 75(2)). Members are appointed and dismissed by the president based on advice from the DPR. Their term of office is five years, renewable once (Article 75(3)).

We discuss Komnas HAM, Komnas Perempuan, and the Child Protection Commission in more detail in Chapter 13.

Finance

The Financial Services Authority

The Financial Services Authority (*Otoritas Jasa Keuangan*, OJK) was established under Law 21 of 2011 on the Financial Services Authority as a supervisory board for the financial services sector.[129] The OJK is an independent body (Articles 1(1), 2(2), Financial Services Authority Law) led by a board of nine commissioners selected by the DPR from nominees proposed by a committee formed by the president (Articles 10, 11(1) and (2)).

The OJK is a powerful agency, with wide authority, much of which was previously exercised by Bank Indonesia, including overseeing banks, the capital market, the insurance sector, pension funds, and finance institutions (Articles 5 and 6).

The OJK is discussed in more detail in Chapters 16 and 19.

Center for Financial Transaction Reporting and Analysis

The Center for Financial Transaction Reporting and Analysis (*Pusat Pelaporan dan Analisis Transaksi Keuangan*, PPATK) was established by Law 15 of 2002 on Money Laundering and has responsibility for preventing and eradicating money laundering and terrorism financing.[130] To do this, it tracks and monitors financial transactions. Law 8 of 2010 imposes compulsory reporting requirements on banks, finance companies, insurance companies, pension funds, listed companies, and investment managers.

The Center is to be free from external interference and influence. Any person who impedes it faces up to four years' imprisonment and a fine of Rp 500 million (Articles 37(1) and 14). Presidential Regulation 48 of 2012 on the Organisation and Work of the PPATK specifies that the Center has a head and a deputy who are appointed by the president for five-year terms, renewable once (Article 31).

[128] As amended by Law 35 of 2014.

[129] As mandated by Art 34, Law 3 of 2004 on the Amendment of Law 23 of 1999 on Bank Indonesia.

[130] Art 39, Law 8 of 2010 on the Prevention and Combating of Money Laundering. See also Law 9 of 2013 on the Prevention and Eradication of Terrorism Financing.

The Business Competition Supervisory Commission

The Business Competition Supervisory Commission (*Komisi Pengawas Persaingan Usaha*, KPPU) was[131] established in 2000 to oversee the implementation of Law 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Competition. It is independent and responsible to the president (Article 30(3) of Law 5 of 1999). It has a chair and a vice-chair, and at least seven members (Article 31(1)), appointed and dismissed by the president with the DPR's approval (Article 31(2)). The chair and vice-chair enjoy a maximum of two five-year terms (Article 31(3)).

The KPPU is discussed in detail in Chapter 20.

The Investment Coordinating Board

The Investment Coordination Board (*Badan Koordinasi Penanaman Modal*, BKPM) is a non-ministerial government institution.[132] It coordinates investment policy among government agencies, Bank Indonesia, the central government, and regional governments, and reports directly to the president (Article 27(1) and (3), Law 25 of 2007 on Investment). Its functions include promoting investment, developing investment opportunities and partnerships, and helping to resolve 'impediments' faced by investors (Article 28).

It also operates an integrated one-stop service centre (*Pelayanan Terpadu Satu Pintu*, PTSP) for granting licensing and investment facilities (Article 1(10), Investment Law).[133] It does so through authority delegated by the institutions with investment licensing authority. This, in theory, enables each stage of investment licensing, from application to issuance of documents, to be done in one place, with staff from delegating agencies on site (Article 1(10)).

The head of BKPM is appointed and dismissed by the president (Article 53(1), Presidential Regulation 90 of 2007), and is assisted by a vice head, secretary, and deputy who are appointed and dismissed by the president on the head of BKPM's recommendation (Article 53(2)). The head of BKPM has status equivalent to a minister (Article 55).

Financial and Development Supervisory Agency

The Financial and Development Supervisory Agency (*Badan Pengawasan Keuangan dan Pembangunan*, BPKP) is the government's internal financial supervisory agency (Article 1(1), Presidential Regulation 192 of 2014 on the BPKP), and is responsible to the president (Article 1(2)). Its head is appointed and dismissed by the president (Article 44).

Many of BPKP's functions overlap with those of the State Audit Board (BPK), discussed above, especially as regards financial, performance, and legal compliance audits. The difference in their functions lies in the institutions they supervise. BPK can supervise and examine all state institutions, while BPKP is restricted to government organizations. But conflicts of authority remain and reform is required. Amid long-standing concerns about BPKP's integrity, calls for its abolition are frequently made.

[131] Art 1(2), Presidential Decision 75 of 1999, as amended by Presidential Regulation 80 of 2008 on the Business Competition Supervisory Commission.

[132] Art 1(1), Presidential Regulation 90 of 2007 as amended by Presidential Regulation 86 of 2012 on the Investment Coordinating Board.

[133] See also Art 3(j), Presidential Regulation 90 of 2007.

The media

The Press Council

The Press Council (*Dewan Pers*) comprises journalists, media managers, community representatives, and media experts (Article 15(1) and (3), Law 40 of 1999 on the Press). The Council's tasks include protecting the press from intervention; establishing journalists' ethics codes and monitoring compliance; helping resolve complaints or cases involving press reportage; helping formulate media-sector rules; improving journalist quality; and keeping a database of media companies (Article 15(2)). As we show in Chapter 21, the Council has formulated codes of ethics, standards and guidelines, and receives complaints about journalistic work, behaviour, and conduct. It also receives allegations of violence directed at journalists or media outlets. However, the Council's power to act is limited.

Press Council membership is determined by the president (Article 15(5)). Members can serve up to two three-year terms (Article 15(6)). The chair and vice-chair are elected by and from the Council's members (Article 15(4)).

The Indonesian Broadcast Commission

Article 6(4) of Law 32 of 2002 on Broadcasting establishes the Indonesian Broadcasting Commission (*Komisi Penyiaran Indonesia*, KPI).

The KPI is a nominally independent commission, with central and provincial-level branches (Article 7(2)–(3)), but national and provincial-level legislatures directly oversee and fund it (Articles 7(4), 9(6), and 53). They also select its members (nine nationally and seven at the regional level) after a fit and proper test (Article 10(2)–(3)). Members must be 'non-partisan' and have no direct or indirect relationship with owners of media organizations (Article 10(1)(g)–(i)). They serve a three-year term, with one further term if reappointed (Article 9(3)).

The KPI is responsible for ensuring broadcasters accommodate community aspirations and the public interest (Article 8(1) and (3)). It receives complaints from the public, establishes programme standards and codes of conduct; and can issue sanctions for breach (Article 8(2)) that include fines or even licence cancellation (Article 55(2)).[134]

We discuss the KPI in Chapter 21.

[134] See also Government Regulation 50 of 2005.

2

Indonesian Laws and Lawmaking

INTRODUCTION

This chapter discusses the types of laws that are commonly used in Indonesia and their basic features. We also discuss their relative authority in the case of conflicts between them. We begin with a brief account of how they are structured.

STRUCTURE OF INDONESIAN LAWS

Indonesian laws follow a common form and share the following features. First, they are referred to by their number and year. So, for example, the formal reference for the 2011 Lawmaking Law is 'Law 12 of 2011 on Lawmaking'. They are also proclaimed 'with the blessing of Almighty God'.

Most Indonesian laws begin with the title of the head of the executive of the level of government primarily responsible for the law. So, for example, statutes begin with 'The President of the Republic of Indonesia', ministerial regulations begin with the name of the minister issuing the regulation, and provincial regional regulations begin with the name of the governor of the province. What then follows is cast as part of a (usually, long) sentence with the relevant executive head as its subject. So, for example, statutes begin as follows:

> The [President of the Republic of Indonesia]
> *Menimbang* or Considering [rationales for the law are inserted here]
> *Mengingat* or Remembering [other relevant laws appear here]
> With the Joint Agreement of the DPR and the President
> Decides:
> To stipulate [the title of the law]

The content of the law itself then follows. Article 1 will usually contain definitions. Any criminal sanctions or penalties usually appear near the end of the statute, followed by any transitional provisions (*ketentuan peralihan*) and closing provisions.

Menimbang literally means 'considering', and this section contains the primary rationales for the law, divided into paragraphs and often conveyed in lofty terms. For example, the 2011 Lawmaking Law states that:

> A. To create Indonesia as a 'law state', the nation must engage in national legal development in a planned, integrated and sustainable way, within a national legal system that guarantees the rights and obligations of all people …
>
> B. To fulfil community needs for good laws, it is necessary to create a regulation about making law using methods that are certain, uniform and standard, which bind all institutions with lawmaking authority.
>
> C. [The 2004] Lawmaking Law contains shortcomings and is unable to accommodate the development of the needs of the community … and must be replaced.
>
> D. Based on the considerations referred to in A, B and C, it is necessary to create a statute on lawmaking …

The 'Mengingat' (literally, 'remembering') section then lists relevant or related laws from which the law being enacted derives its legal authority. These are usually of the same or a higher level to the law being enacted. So, for example, the 2011 Lawmaking Law refers to three constitutional provisions that deal with the national legislature's lawmaking powers.

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By contrast, laws much lower on the hierarchy tend to list more high-level laws in their 'Mengingat' sections. For example, Yogyakarta Special Region Regulation 1 of 2013 on Procedures for Making Special Region Regulations, lists eleven laws, including five statutes, three government regulations, one ministerial regulation, and two regional regulations.

Transitional provisions usually outline the effect that the law being enacted will have on pre-existing laws, whether of the same or different level as the law being enacted. The purposes of transitional provisions are to: avoid legal vacuums; guarantee legal certainty; give legal protection to those affected by provisions of the law; and cover issues that are otherwise transitional or temporary.[1]

Closing provisions will usually identify who implements the law and specify when the law will come into force.[2] They can also set out the various laws or regulations invalidated or otherwise affected by its passage.

Most laws then conclude by ordering that the enactment of the law be included in the State Gazette (*Lembaran Negara*). This is followed by: the date of executive assent with the signature of the official responsible, such as the president (for national statutes), a minister (for ministerial regulations), or a governor (for provincial regional regulations); the signature of another senior official, such as the Minister for Law and Human Rights (for national laws) or the regional legislative secretary (for regional regulations); and the date of passage.

Elucidations

Indonesian statutes, like most other types of laws in Indonesia, come with an explanatory memorandum or elucidation (*penjelasan*). The elucidation customarily begins with a section entitled 'General' (*Umum*), which sets out the purposes for which the law was enacted, and the philosophical or theoretical bases of the law. This part of the elucidation is often titled the 'General Elucidation' and can sometimes be long. After the general elucidation, 'Article-by-Article' (*pasal demi pasal*) explanations appear.

In practice, judges and lawyers consider elucidations to be authoritative interpretative sources and they are, therefore, often treated as though part of the law they purport to elucidate. This makes them highly relevant in determining the meaning of statutory provisions. Despite this, the formal authority of elucidations is limited: they are legally subordinate to the instrument they accompany. Although elucidations are often included alongside the law itself in textbooks and on websites, strictly speaking they are separate from the law they purport to elucidate. They are, in fact, 'announced' in a separate publication to the text of the law itself. Statutes are, as mentioned, published in the State Gazette, whereas their elucidations are published in the Supplement to the State Gazette (*Tambahan Lembaran Negara*).) According to established practice,[3] elucidations must, therefore, neither contradict the provisions of the law they purport to elucidate, nor broaden, narrow down, or add to that law. So, for example, if a statutory provision is contradicted by the elucidation that purports to clarify it, or is inconsistent with it, then the statutory provision prevails.

These principles are confirmed in Schedule II of Law 12 of 2011 on Lawmaking, which provides legal drafting guidance. It states that elucidations:

1. should only include explanations of words, phrases, sentences or equivalent foreign words/expression in norms, that can be accompanied by an example (Point 176);
2. should not result in a lack of clarity regarding the norm referred to (Point 176);
3. cannot be used as a legal basis to make further laws and cannot set out formulations that contain norms (Point 177); and
4. must not seek to amend provisions of laws and regulations (Point 178).

[1] Point 127, Schedule to 2011 Lawmaking Law. [2] Point 137, Schedule to 2011 Lawmaking Law.
[3] As described by the Constitutional Court in Decision 005/PUUIII/2005, p. 37.

Likewise, article-by-article elucidations must neither contradict the substance of the text of the law nor widen, narrow or add to it (Point 186).

Elucidations must always be consulted when reading Indonesian laws to help the reader determine the meaning of the provisions of that law. However, elucidations are often poorly drafted and sometimes cause almost as much confusion as they remove. And many elucidations avoid explaining the more legal complex or controversial terms used in the laws they purport to clarify. It is particularly frustrating to find the phrase *cukup jelas* (sufficiently clear) repeated over and over again in many article-by-article elucidations, when, in fact, nothing could be further from the truth.

Elucidations in the courts

Elucidations that contradict the text of the statute they purport to elucidate are susceptible to constitutional challenge. In several cases, the Constitutional Court has invalidated elucidations that are inconsistent with their corresponding statutory provisions.[4] According to the Court, such inconsistencies cause doubts in the implementation of the statute. These doubts, in turn, 'give rise to legal uncertainty in practice', which violates Article 28D(1) of the Constitution. This states that 'Every person has the right to legal recognition, guarantees, protection and certainty that is just and to equal treatment before the law'. The Court has also held that such legal uncertainty is contrary to the spirit of the 'law state' (*negara hukum*), established under Article 1(3) of the Constitution, for which legal certainty is a fundamental precondition.

Incidentally, we note that the Constitutional Court has, sometimes, also invalidated an article-by-article elucidation after first invalidating the Article to which that elucidation relates.[5] This is because, as mentioned, an elucidation has no independent legal force; once the provision it elucidates loses its validity, so too does the elucidation.

THE HIERARCHY OF LAWS

Indonesia's 'hierarchy of laws' lists various types of laws commonly used in Indonesia in descending order of their legal authority vis-à-vis the other types of laws on the list. The hierarchy is set out in Article 7 of Law 12 of 2011 on Lawmaking, as shown in Table 2.1.

The precise operation of the hierarchy is unclear, disputed, and highly problematic. Most fundamentally, neither the 2011 Lawmaking Law, nor any other Indonesian legal instrument or judicial decision of which we are aware, explains precisely how the hierarchy works or, more particularly, the purposes for which it can be used, if any.

However, it appears that, theoretically at least, lower-level laws derive their authority from laws higher than their type on the hierarchy. For example, government regulations are usually issued in response to a statutory provision that directs the government to issue a government regulation to explain a matter briefly mentioned or covered generally in the statute. Likewise, many regional regulations cite provisions of national statutes as legal bases for their enactment. For this reason, many Indonesian lawyers say that lower-level laws must 'implement' a law immediately above it in the hierarchy.

It follows that a lower-level law must not conflict with a higher law upon which it relies for validity. For example, a government regulation must not contradict a statute enacted by Indonesia's national legislature or the Constitution, which sits at the pinnacle of the hierarchy. However, a government regulation will prevail over a presidential regulation in the event of any inconsistency.

It is commonly said that statutes and the laws below them can be revoked if a new law of equal or higher status is enacted. The revocation can be 'express', that is, the old law can be

[4] See, for example, Constitutional Court Decisions 005/PUU-III/2005; 003/PU-IV/2006.
[5] Constitutional Court Decision 52/PUU-X/2012.

Table 2.1 Indonesia's hierarchy of laws

English	Indonesian	Abbreviation	Lawmaking Law Article
1945 Constitution	*Undang-Undang Dasar* 1945	UUD 1945	7(1)(a)
People's Consultative Assembly Decision	*Ketetapan Majelis Permusyawaratan Rakyat*	KepMPR	7(1)(b)
Statute/legislation (produced by the national legislature, the DPR)	*Undang-undang*	UU	7(1)(c)
Interim Emergency Law (literally, 'Government regulation in lieu of Law')	*Peraturan Pemerintah Pengganti Undang-undang*	PerPPU/PerPu	7(1)(c)
Government regulation	*Peratran Pemerintah*	PP	7(1)(d)
Presidential regulation	*Peraturan Presiden*	PerPres	7(1)(e)
Provincial regulation	*Peraturan Daerah Provinsi*	Perda Provinsi	7(1)(f)
County/city regulation	*Peraturan Daerah Kabupaten/Kota*	Perda Kabupaten/ Kota	7(1)(g)

named in the new law as being revoked by that new law. It can also be implicitly revoked if the new law covers the same subject matter as the old law.[6]

We now discuss each type of law in the hierarchy.

The Constitution

Indonesia's current Constitution is a significantly expanded version of its first Constitution, brought into force the day after Indonesia declared its independence on 17 August 1945, immediately after the Japanese surrender at the end of the Second World War. In March 1945, the Japanese had facilitated the establishment of the Investigating Body for Preparatory Work for Indonesian Independence (*Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia*), in which prominent Indonesian nationalists discussed preparations for Indonesia's independence within the broader control of the so-called Japanese Greater East Asia Co-Prosperity Sphere. The Body discussed various alternative constitutional models for adoption by Indonesia—including an Islamic state, constitutional democracy, and authoritarianism. With the Japanese surrender looming after Hiroshima was bombed, the Investigating Body was disbanded and replaced with the Preparatory Committee for Indonesian Independence (*Panitia Persiapan Kemerdekaan Indonesia*), which was established on 7 August 1945.[7]

Fears that the Dutch might return to Indonesia to recapture their former colony meant the Constitution was hastily drafted and short, with its main objective being to establish Indonesia as an independent state. Indeed, it was 'more like notes for a constitution than a comprehensive basis for a new state', to be replaced after 'emergency conditions' had passed.[8] Yet despite only ever being considered temporary by its drafters, the 1945 Constitution remained in force unamended from 1945 to 1999, except for 1949 to 1959,

[6] Bilal Dewansyah, 'Undang-Undang Dicabut, Apakah Peraturan Pelaksanaannya Masih Berlaku?' *Hukumonline* (26 May 2014).

[7] MC Ricklefs, *A History of Modern Indonesia since C. 1200* (Stanford University Press 2008) 245–46.

[8] Simon Butt and Tim Lindsey, *The Indonesian Constitution: A Contextual Analysis* (Hart 2012).

when a short-lived Federal Constitution (1949–50) and then an Interim Constitution (1950–59) prevailed.

Although potential constitutional models were passionately debated in the Preparatory Committee, a hybrid was eventually adopted. The 1945 Constitution did not mention Islam but established Indonesia as a religious state, by incorporating Pancasila, Indonesia's state philosophy discussed below, in its Preamble. The first principle (*sila*) of Pancasila is 'Belief in Almighty God', which has been interpreted to give the state a significant role in the administration of religion and to prohibit atheism. The Constitution was also not liberal democratic, providing for no human rights guarantees and reserving significant power for the president at the expense of the legislature and other institutions of state.[9] At the same time, the Constitution appeared to reject authoritarianism, declaring that Indonesia was a state based on law (*Rechtsstaat*), not on power (*Machtsstaat*), and that the judiciary was to be independent.[10] Yet in practice—partly because the Constitution did not provide for judicial review of government law or actions and because the courts were largely dependent on government—the Constitution became the legal basis for the highly authoritarian systems that prevailed from 1957 to 1998.

After Soeharto fell in May 1998, the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*, MPR) amended the 1945 Constitution in four annual rounds from 1999 to 2002. The amendments were so extensive that they arguably replaced the 1945 Constitution, rather than simply amending it. The resulting changes transformed Indonesia into a constitutional democracy. As explained in Chapter 1, Indonesia's Constitution, like most others, establishes the arms of government—executive, legislative, and judicial—and outlines their relative jurisdictions, establishing a separation of powers system. It now also contains a catalogue of human rights, mirroring international norms (particularly the Universal Declaration of Human Rights), and establishes various important government institutions, such as the Judicial Commission and the State Audit Board (*Badan Pemeriksaan Keuangan*, BPK).

Article 37 of the Constitution sets out constitutional amendment procedures. Only the MPR has power to amend the Constitution. To do so, one-third of MPR members must propose that amendment be 'put on the agenda' (Article 37(1)). To pass the amendment, a quorum of two-thirds of the MPR is required (Article 37(3)), as is the agreement of 50 per cent of the MPR members in attendance plus one member (Article 37(4)). Article 37 does not impose restrictions on the nature or substance of amendments, save for one exception: the form of the state, the Unitary Republic of Indonesia, 'cannot be changed' (Article 37(5)). Presumably, however, this restriction could be overcome, simply by amending Article 37(5) of the Constitution itself, using the procedures set out in Articles 37(1)–(4) just described.

Pancasila

The 1945 Constitution contains, in its Preamble, the five principles constituting Indonesia's national ideology—Pancasila (literally, 'The Five Principles'). These are:

1. *Ketuhanan Yang Maha Esa* (Belief in Almighty God);
2. *Kemanusiaan Yang Adil dan Beradab* (A Just and Civilized Humanity);
3. *Persatuan Indonesia* (The Unity of Indonesia);
4. *Demokrasi*; and
5. *Keadilan Sosial* (Social Justice).

[9] Simon Butt and Tim Lindsey, 'State Power to Restrict Religious Freedom: An Overview of the Legal Framework' in Tim Lindsey and Helen Pausacker (eds), *Religion, Law and Intolerance in Indonesia* (Routledge 2016).

[10] See General Elucidation and Article 24 of the Constitution.

In practice, Pancasila has primarily been of political significance rather than legal importance. The philosophy's malleability, which we discuss below, has certainly been used effectively in politics. Articulated by Indonesia's first president, Soekarno, in the lead-up to Indonesia's declaration of independence on 17 August 1945, its primary purpose was to bring islands of the archipelago that had been under Dutch colonial rule beneath the single banner of Indonesia—despite their extraordinarily diverse mix of ethnicity, religion, and culture. In particular, the first principle—Belief in Almighty God—was intended to placate those who wanted Indonesia to be an Islamic state but without alienating more moderate Muslims, and non-Muslims (particularly in eastern Indonesia), who did not want to be subject to the corpus of Islamic law. As discussed in Chapter 1, Indonesia is, therefore, formally a religious state but not an Islamic one.

However, if Soekarno had used Pancasila primarily as an 'inclusivist' ideology, Indonesia's second and longest-serving president, Soeharto, used it in an altogether different way: to 'exclude' critics of the government and to justify repressive government action, particularly against dissidents. Soeharto's New Order regime, in effect, reserved for itself exclusive power to determine the substantive meaning of Pancasila and to use it for its own purposes, including by labelling critics 'anti-Pancasila' and convicting them of subversion.[11]

Due to its association with the repression of the Soeharto regime, Pancasila fell out of favour in the immediate post-Soeharto period but was retained during the constitutional amendment process. It has arguably experienced a revival in recent years, with liberal democrats appealing to it to resist those pushing for a greater role for Islamic law.[12]

Legal significance of Pancasila

The Constitution does not refer to Pancasila by name. However, because its five principles are contained in the Preamble to the Constitution, successive governments and many Indonesian legal scholars have claimed that the philosophy is the theoretical determinant of validity of all law and government action.[13] The 2011 Lawmaking Law itself confirms, in Article 2, that the state philosophy is the 'source of all sources of law'.[14] Most Indonesian jurists therefore consider Pancasila unalterable by way of contemporary legal process. The Constitutional Court confirmed Pancasila's legal pre-eminence as Indonesia's formal basis of state (*dasar negara*) in the *Four Pillars* case (2013).[15]

Yet precisely how Pancasila's legal pre-eminence translates into law and how it is to be applied, if at all, has always been unclear. In particular, Pancasila appears to be inherently unsuitable as a basis for law. It is a particularly vague set of precepts, with wording 'long on rhetoric and sentiment, but short on specific prescriptions'.[16] In 1978, the MPR issued an official interpretation of Pancasila: The Guide to Living and the Practice of Pancasila[17] but even this 'official' interpretation of Pancasila lacked detail. If anything, the Guide obscured

[11] Todung Mulya Lubis, *In Search of Human Rights: Legal-Political Dilemmas of Indonesia's New Order, 1966–1990* (Gramedia Pustaka Utama 1993) 8.

[12] Tim Lindsey, *Islam, Law and the State in Indonesia* (IB Taurus 2012) 49–51.

[13] See, for example, Rozikin Daman, *Hukum Tata Negara: Suatu Pengantar* (Raja Grafindo Persada 1993).

[14] As did Art 2 of its predecessor—Law 10 of 2004 on Lawmaking.

[15] Constitutional Court Decision 100/PUU-XI/2013. The applicants in this case argued that Art 34(3b) of Law 2 of 2011 Amending Law 2 of 2008 on Political Parties, which required parties to promote the 'Four National Pillars of Pancasila, the Unitary Republic, Unity in Diversity and the 1945 Constitution', was unconstitutional because Pancasila alone was the basis of the state, as the founding fathers had indicated in the Preamble to the Constitution. The majority observed that Pancasila was pre-eminent and that this was obscured by presenting it at the same 'level' as these other three national symbols.

[16] Michael Morfit, 'Pancasila: The Indonesian State Ideology According to the New Order Government' (1981) 21 *Asian Survey* 838.

[17] MPR Decision II/MPR/1978 concerning the Guide to Living and Practice of Pancasila.

and mystified Pancasila, leaving the government with the exclusive power to determine its substantive meaning, enabling the government to use it for its own purposes.[18]

Indeed, just as Pancasila has been used to justify very different political systems, it has also been used to justify fundamentally different laws, policies, and government actions. For example, Pancasila has formally underpinned all three post-Independence constitutions. Yet, despite sharing the same *grundnorm*, these constitutions established substantially different systems of government. Both the 1949 and 1950 Provisional Constitutions were 'liberal democratic' and formally guaranteed various human rights.[19] The 1949 Constitution, which established Indonesia as a federal state, contained provisions that gave the courts power to review the constitutionality of some legislation.[20] The 1950 Constitution abolished federalism but maintained the western-style liberal democratic parliamentary system of government that applied under its predecessor. However, as mentioned, the 1945 Constitution, in the form it was applied for more than four decades before it was amended, was certainly not liberal democratic. It provided almost unfettered executive power and discretion, particularly to the president, and contained no human rights guarantees.

At best, Pancasila's vagueness gives it flexibility, enabling its interpretation to change as economic, social, and political conditions develop. Yet that very flexibility renders it so lacking in certainty that its application is unpredictable, making it unreliable as a basis for law. To be used effectively, the implications of each Pancasila principle need clear articulation in legal form, by a court or a legislature.

At worst, it might be argued that Pancasila's principles contradict each other. For example, the Unity of Indonesia seems to represent a commitment to maintain Indonesia's territorial integrity. But what if a majority of Indonesians from a particular region decide, consistent with the principle of democracy, to break away from Indonesia? This is precisely what happened when a majority of the people of East Timor (now Timor Leste) voted, by referendum, to become an independent state in 1999. Another example of conflict involves Belief in Almighty God and a Just and Civilized Humanity. On the one hand, Pancasila appears to require a person to have a religion. Atheism is, therefore, clearly 'anti-Pancasila'. Yet how does this sit alongside Just and Civilized Humanity, at least to the extent that it implies protection for fundamental rights, including freedom not to have a religion?

To our knowledge, Indonesia's courts have not yet invalidated a law or reviewed government action against Pancasila. The Constitutional Court appears to have only just begun considering Pancasila in its decision-making but has not yet developed sophisticated jurisprudence to explain precisely what the Five Principles really mean or require. For example, in one case, the Court stated that political decision-making through deliberation and consensus is a 'process based on Pancasila' but that decision-making by majority vote does not contradict 'Pancasila Democracy'.[21] In another, the Court stated that Social Justice is reflected in Article 33(3) of the Constitution, which, in the Court's interpretation at least, requires significant state involvement in natural resource exploitation for the 'greatest prosperity of the people'.[22]

[18] Lubis (n 11) 8; Hans Thoolen, *Indonesia and the Rule of Law: Twenty Years Of 'New Order' Government: A Study* (F Pinter 1987) 38.

[19] Lubis (n 11) 64–70.

[20] Purwoto Gandasubrata, 'Judicial Review in Indonesia' (1996) 2 *Indonesian Law and Administration Review* 46, 48.

[21] Constitutional Court Decision 3/PUU-XII/2014.

[22] Constitutional Court Decision 85/PUU-XI/2013. On Art 33 more generally, see: Simon Butt and Tim Lindsey, 'Economic Reform When the Constitution Matters: Indonesia's Constitutional Court and Article 33' (2008) 44 *Bulletin of Indonesian Economic Studies* 239; Butt and Lindsey (n 8) 20; Simon Butt and Fritz Edward Siregar, 'The BP Migas Case: Implications for the Management of Natural Resources' (2013) 31(2) *Journal of Energy & Natural Resources Law* 107.

Decisions of the People's Consultative Assembly

As discussed in Chapter 1, before the constitutional amendments of 1999–2002, the MPR was the 'highest' institution of state, being the institution that exercised the 'people's sovereignty'. However, it met rarely and primarily exercised only two main functions. The first was, in effect, to reappoint President Soeharto every five years. Because he was able to control its membership, he could guarantee his reappointment, even though, constitutionally, he was formally subservient to the MPR as its 'mandatory'.[23] The second function was to issue decisions (*ketetapan*), usually to pronounce the 'general outlines of state policy' (*Garis-Garis Besar Haluan Negara*) and to direct the national legislature (*Dewan Perwakilan Rakyat*, People's Representative Assembly, DPR), to pass laws on specified matters. These decisions were always issued at the behest of the government and cast in very broad terms. Since the constitutional amendments of 1999–2002, the MPR is, in effect, a joint sitting of the DPR and the DPD (*Dewan Perwakilan Daerah* or Regional Representatives Council, discussed further below) and no longer has either of the powers just described. Presidents and vice-presidents are now directly elected and lawmaking is left to the DPR, as discussed below. The MPR's primary function is now to amend the Constitution, and that has not happened since 2002.

One of the Constitution's 'Additional Provisions' (*aturan tambahan*), inserted by the Fourth Amendment of 2002, ordered the MPR, in its 2003 Annual Session, to review the 139 decisions it had issued between 1960 and 2002 to determine which should remain in force and which should be revoked. At this session, the MPR dutifully invalidated most of its own decisions. The legality of this exercise was doubtful; the MPR's invalidations were themselves contained in an MPR decision which, as mentioned, was an instrument the Constitution no longer authorized the MPR to issue.[24]

Presumably because so few MPR decisions remain in force, the 'Hierarchy of Laws' contained in Law 10 of 2004 on Lawmaking did not even include MPR decisions. However, this led to uncertainty about whether even the MPR decisions that survived the review process had any legal effect. It is now clear that they do. When the 2011 Lawmaking Law was enacted, MPR decisions were again included in the hierarchy to remove this uncertainty.

In summary, then, while the MPR now lacks constitutional authority to issue decisions, those it enacted before its power to issue decisions was removed remain in force and applicable, provided the MPR did not invalidate them in its 2003 review.

Statutes and legislative processes

Statutes (*undang-undang*) are laws enacted by the national legislature, the DPR. Before Soeharto's fall in 1998, the DPR was largely beholden to the executive, with military and other loyalist appointees occupying a significant portion of seats. For much of Soeharto's rule, only two opposition parties were permitted, each a forced amalgamation of smaller parties with different political goals and interests.[25] With military backing, the

[23] Chapter 6(III)(3), Elucidation to the Original 1945 Constitution. The Elucidation to the Constitution was removed by the post-Soeharto the amendments: Butt and Lindsey (n 8) 31.

[24] Specifically, the MPR invalidated eight decisions; conditionally invalidated three decisions, declared eight as remaining in force until the 2004 election; declared eleven valid until new statutes were issued; declared five valid until new MPR standing orders were made; and declared that 104 were no longer necessary because they had already been implemented: MPR Decision I/MPR/2003 on Material and Legal Status Review of MPRS and MPR Decisions from 1960 to 2002.

[25] So, for example, by the end of Soeharto's rule the DPR comprised 425 elected members from the PPP, the PDI, and the government's Golkar, together with seventy-five army members appointed by the government.

government monitored the activities of those political parties and even sought to install party leaders who were government sympathizers. These parties never posed a serious threat to Soeharto's political vehicle—Golkar (*Golongan Karya*, or 'Functional Groups')—which comfortably won every election from 1971 until 1997, usually with a final vote that was within a few percentage points of President Soeharto's publicly announced target. The result was that the DPR became little more than a 'rubber-stamp' for the regime's legislative programme.[26]

Indonesia's legislature has since been dramatically overhauled. With Soeharto's fall, new parties were established, and forty-eight of them contested the 1999 elections.[27] After the next elections, in 2004, the DPR was filled solely by democratically elected representatives, as military personnel were no longer allocated seats.[28] In 2017, the DPR had 560 representatives, all of whom were elected and belong to a political party. The number of seats was increased to 575 for the 2019 elections.[29]

The complex process of planning, deliberating, and then passing legislation in Indonesia is discussed below. While the DPR appears to be primarily responsible for this process, the executive also plays an important role. Each bill is discussed by the DPR and the president to 'obtain joint approval' (Article 20(2) of the Constitution) and, if joint approval is not obtained, the Bill cannot be introduced to the DPR during the same period (Article 20(3) of the Constitution). Once a Bill obtains joint approval, the president is to pass it into law (Article 20(4) of the Constitution) and, if he or she does not do so, then the Bill is deemed passed in within thirty days (Article 20(5) of the Constitution).

Article 20 is widely considered to have significantly reduced the president's authority to dictate the legislative process as occurred during the Soeharto period.[30] This view is supported by Article 69(2) of the 2011 Lawmaking Law, which simply states that a statute will 'pass' the DPR if it is 'approved' by a majority of legislators in attendance, and does not mention 'joint approval'. Nevertheless, the president may retain some power to prevent the passage of legislation. Although he or she cannot withhold assent after a Bill has obtained his or her approval and that of the DPR, there appears to be nothing preventing the president from preventing the passage of a law by simply refusing to give that 'joint approval'. To our knowledge, this interpretation of Article 20 of the Constitution has not yet been tested.

The subject matter of legislation appears to be virtually unlimited, provided, of course, that it does not conflict with an MPR decision or the Constitution, both of which are higher than statutes on the hierarchy of laws. Article 10(1) of the 2011 Lawmaking Law specifies subject matter that must be regulated through legislation and, therefore, presumably cannot be regulated by a lower-level law. These are: matters that either the Constitution or another statute require to be regulated by statute; and the ratification of particular international agreements. Article 10(1) also says that legislation is the legal instrument required to respond to Constitutional Court decisions and to fulfil 'legal needs in the community' (though this concept is not defined).

[26] Adam Schwarz, *A Nation in Waiting: Indonesia in the 1990s* (Westview Press 1994) 272; Patrick Ziegenhain, *The Indonesian Parliament and Democratization* (Institute of Southeast Asian Studies 2008) 45; Stephen Sherlock, *The Indonesian Parliament after Two Elections: What Has Really Changed?* (Centre for Democratic Institutions 2007) 37 <http://www.cdi.anu.edu.au/_research/200607/D_P/2007_04_PPS_3_INDO_Sherlock/2007_04_PPS3_Sherlock_Final.pdf>.

[27] The number of parties contesting elections has since been reduced, with the tightening of party validation requirements and legislative thresholds—that is, the number of votes required to take up seats in the DPR: Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Brill 2015).

[28] The Fourth Amendment to the Constitution (2002) removed the military from the legislature for the 2004 elections.

[29] Art 186, Law 7 of 2017 on General Elections.

[30] Butt and Lindsey (n 8).

Revocation and invalidation

Statutes can, like other laws in the hierarchy mentioned above, be expressly or implicitly revoked by another statute. Most statutes contain a statement in their closing provisions identifying the laws the validity of which are affected by that statute. A statute might, for example, explicitly invalidate the statute it replaced or provisions of older statutes or regulations. For example, Law 4 of 2009 on Mineral and Coal Mining states in Article 173(1) that:

> When this Law comes into force, Law 11 of 1967 on Mining … is revoked and is declared to be no longer in force.

Statutes are susceptible to constitutional review by the Constitutional Court upon the application of an Indonesian citizen or public/private entity. Indeed, statutes are the *only* types of legal instruments that the Constitutional Court has jurisdiction to review (Article 24C(1) of the Constitution).[31] In constitutional review cases, the Court assesses whether the provisions of the statute for which review is sought are consistent with the Constitution. If the Court decides that these provisions—or indeed the entire statute—are unconstitutional, then it can declare it to 'have no binding force' (*tidak mempunyai kekuatan mengikat*). As we show in Chapter 5, the Court also commonly issues decisions declaring a statute to be unconstitutional unless interpreted in a way specified by the Court.

The lawmaking process

The Prolegnas

At the beginning of its five-year term, the DPR formulates a five-year National Legislative Program (Prolegnas or *Program Legislasi Nasional*), which lists the Bills it plans to enact in the short to medium term.[32] The list should include Bills required by the 1945 Constitution or other laws, national development plans, government and legislative objectives, and the 'legal aspirations and needs of society' (Article 18 of the 2011 Lawmaking Law). Also required is an outline of each Bill's subject matter, aims, targets, and scope, and an explanation about how it 'fits' with existing laws.[33] Each Bill must also be accompanied by a formal academic study (*naskah akademik*) that outlines why the Bill is necessary.[34] However, the absence of a naskah akademik accompanying a Bill during introduction, deliberation, and passage, will not, of itself, render invalid the statute thereby enacted.[35]

A Legislative Committee (*Badan Legislasi* or Baleg), elected at the beginning of each five-year DPR term, oversees the preparation of the Prolegnas. DPR factions and commissions, the DPD, the government, and the community can submit proposed Bills to Baleg for inclusion in the Programme. Baleg prepares a draft Plan and puts it before a DPR

[31] As discussed further below, interim emergency statutes issued by the president (*Perpu* or *Perppu*) share the same position as statutes on the hierarchy. The Constitutional Court has held in several decisions that its constitutional review powers extend to Perpu on grounds that these are equivalent in effect to statutes.

[32] Art 19(1), 2011 Lawmaking Law. The list can be reviewed and amended annually by a plenary sitting of the DPR: Arts 20–22, 2011 Lawmaking Law. See generally Articles 16–23, Lawmaking Law.

[33] Molly Lesher, 'The OECD Regulatory Reform Review of Indonesia Market Openness' (OECD 2012) 8. See also Arts 19(1), 19(2), and 43(4), 2011 Lawmaking Law.

[34] Art 19(3), 2011 Lawmaking Law. The academic study must meet formal requirements in Schedule I of this Law. Such studies are not required for legislation concerning the national budget, interim emergency laws, for annulling legislation or interim emergency laws, or for implementing regulations (Art 43(4), 2011 Lawmaking Law).

[35] According to the Constitutional Court, if a statutory norm is unclear because a law is not accompanied by an academic draft, a judge can 'give meaning to it through legal interpretation'. Alternatively, if the norm is 'multi-interpretable', the Constitutional Court can clarify or invalidate it for breaching the constitutional guarantee of legal certainty (Constitutional Court Decision 34/PUU/VIII/2010, para [3.14.9]).

Plenary Session for approval. It then helps prepare Bills initiated by the DPR, DPR commissions, and members before they are presented to the DPR Chairperson.

The Prolegnas is notorious for its rigidity—a Bill will not ordinarily be deliberated or enacted if not included on its list. However, the 2011 Lawmaking Law provides scope for unlisted Bills to be considered for enactment. Article 23(1) allows 'open' categories to be included on the list to accommodate the need to: ratify international conventions; respond to Constitutional Court decisions; address national income and expenditure budgets; form, split, or consolidate provinces, cities, or counties; or endorse or annul interim emergency laws. Article 23(2) of the 2011 Lawmaking Law also allows the DPR and president to introduce unlisted Bills to overcome 'extraordinary circumstances'; conflict situations and natural disasters; and 'other circumstances' that create 'national urgency' for a Bill, as agreed by Baleg and the Law and Human Rights Minister (Article 23(3)).

Introducing Bills into the legislature

Bills included on the Prolegnas can be introduced by the president, the DPR, and the DPD (Article 43(1)-(2)). Bills proposed by the president (*usul inisiatif Presiden*) are generally prepared by a government minister or the head of a non-department government institution who works in the area to which the subject matter of the Bill relates (Article 47). After the Bill has been drafted by a team of government officials, academics, and experts, the DPR Chairperson introduces the Bill into the legislature, accompanied by a President's Letter of Introduction (Article 50(1)) and the Bill's accompanying *naskah akademis* (Article 43(3)). A minister must be appointed to represent the president during deliberations of the Bill in the DPR (Article 50(2)). Without such a presidential representative, deliberation is likely to be delayed. In the usual course of events, the DPR should begin deliberations within sixty days of receiving the President's Letter (Article 50(3)).

Bills introduced by the DPR (*usul inisiatif DPR*) can be prepared by Baleg, a DPR commission, a coalition of commissions, or a group of members. A Plenary Session will then decide whether the DPR should consider the Bill and can suggest modifications to the Bill. If accepted for deliberation, the Bill is sent to the president and, if the subject matter of the Bill covers a matter relevant to the DPD, the DPD leadership, who must then nominate an official to represent the DPD in DPR deliberations over the Bill.

DPD-initiated Bills can originate from a governor or mayor, or a DPD member or commission, and must deal with a matter falling within the DPD's purview—that is, regional affairs. These include: the relationship between central and local governments, including financial issues; the formation, expansion, and merger of regions; and the management of natural and other economic resources. A quarter of DPD members must agree before the Bill is drafted and then sent to the DPR, a Plenary Session of which decides whether to deliberate it and, ultimately, whether to enact it.

Deliberation and enactment

Once the DPR has decided to consider a Bill, it is deliberated in a two-stage process. During Stage I deliberations, the various DPR factions and government representatives meet to discuss and prepare it (with the DPD, if the Bill relates to regional affairs).[36] Stage II deliberations occur when a DPR plenary session considers the Bill and decides whether to pass it into law.

[36] See Constitutional Court Decision 92/PUU-X/2012.

Stage I deliberations usually take place in one of the DPR's Commissions (*Komisi*)—the primary working units of the DPR.[37] Almost all of the DPR's main functions are performed in commissions, except those performed by the Plenary Session, and each DPR member (except its leadership) sits on one. Each commission is responsible for specified matters, and is usually entrusted with deliberating Bills, supervising the implementation of laws, and overseeing the state budget relating to those matters.

At time of writing, the DPR had the following eleven Commissions:

I. defence, foreign affairs, communications and information, and intelligence;
II. domestic governance, regional autonomy, state apparatus, and elections;
III. legal affairs and law, human rights, and security;
IV. agriculture, forestry, maritime affairs, fisheries, and food;
V. transport, telecommunications, public works, public housing, village development, and disadvantaged areas;
VI. trade, industry, investment, cooperatives, small and medium businesses, and state-owned companies;
VII. energy, natural mineral resources, research and technology, and the environment;
VIII. religion, social affairs, and the empowerment of women;
IX. health, labour affairs, and transmigration;
X. education, youth affairs, sports, tourism, art, and culture; and
XI. finance, national development planning, banking, and non-bank financial institutions.[38]

During these Stage I deliberations, a representative of the Bill's initiator will usually introduce the proposed Bill and explain its rationale. Individual DPR members, factions, and government officials are then given an opportunity to discuss the proposed Bill. They can also seek public opinion, call experts, and discuss the Bill with leaders of state or other institutions whose work relates to the substance of the Bill.[39] After deliberations have concluded, the commission decides whether to introduce the Bill before a DPR Plenary Session for Stage II deliberations.

During Stage II, the Plenary Session is given a summary of the Stage I deliberations and the conclusion reached, and then factions and individual members can comment on the Bill.[40] Once debate has concluded, the DPR will usually first seek to pass legislation through deliberation and consensus (*musyawarah dan mufakat*). If members or factions initially refuse to pass the Bill, then further deliberations and, if necessary, negotiations, can take place. If consensus still cannot be reached, a vote is taken. A Bill will be considered 'approved' if a majority of legislators in attendance vote in favour of it.[41] Laws that are not

[37] They can also take place in legislative or budget agency meetings, or other special committee meetings. The *Badan Musyawarah* (Deliberative Body) decides who will deliberate particular Bills and where they will be deliberated. This will usually depend on: the body or individual proposing the Bill; the expertise required to deliberate or draft the Bill; whether the issues covered in the Bill fall within the scope of a given body or commission; and the number of Bills already being handled by the given legislative body or commission (see Art 132, Law 1 of 2014 on DPR Procedural Rules).

[38] See DPR website: <http://www.dpr.go.id/akd/komisi>.

[39] See Arts 132 and 145, 2014 DPR Procedural Rules. Under Art 96(1) of the 2011 Lawmaking Law, members of the public have the right to make submissions about laws and regulations under deliberation. Consultations may take place via public hearings, working visits, seminars, workshops, and discussions (Art 96(2)). Lawmakers must ensure that community members can easily access Bills to facilitate the consultation process (Art 96(4)).

[40] The DPD is also permitted to present views and participate in debates if the Bill relates to regional affairs (Constitutional Court decision 92/PUU-X/2012).

[41] Art 69(2), 2011 Lawmaking Law.

approved cannot be re-submitted to the DPR during the remainder of its term.[42] While the DPD can initiate and deliberate Bills relating to regional affairs, it may neither vote upon them, nor block them.

If approved, the Bill is then sent to the State Secretariat to be signed by the president. If the president does not sign within thirty days, the law is, as mentioned, deemed 'enacted' regardless.[43] The DPR and the government, or the initiating ministry, must ensure that the statute is published in the official State Gazette (*Berita Negara*) and its elucidation in the Official Supplement to the State Gazette (*Tambahan Berita Negara*).[44]

Critiques of the legislative process

Legislative processes in Indonesia are notoriously problematic. The DPR is infamous for 'money politics', with its members perceived by many to be among the most unprofessional and corrupt holders of public office in Indonesia.[45] This perception is fuelled by a regular flow of sex and ethics scandals, and the successful prosecution by Indonesia's Corruption Eradication Commission (*Komisi Pemberantasan Korupsi*, KPK) of DPR members from all parties.

The DPR is also renowned for its lack of legislative output—particularly for failing to meet its own legislative targets as set out in the Prolegnas. In the first year of its five-year term, for example, the 2014–19 DPR passed only three statutes.[46] In 2016, it improved its performance but still only produced twenty-two of the forty statues it had planned.[47]

There are at least three reasons for this low output. First, the legislature is said to be hampered by complicated lawmaking processes and procedures. These include the need to coordinate with relevant ministries, of which there might be several for each Bill, all with their own bureaucratic and political interests that they want incorporated.[48]

Second, post-Soeharto legislatures have been notorious for high levels of fragmentation and for 'politicking'. No party has held a majority in the DPR since the 1999 elections, forcing parties to cobble together coalitions to enact statutes. However, these coalitions are loose and often readily broken as legislation is being deliberated. Reaching a consensus, or even obtaining majority endorsement, for legislation is therefore often difficult and requires significant time for negotiation. It is thus very common for work to commence on the drafting and deliberation of Bills, only for them to be deprioritised or put off for years. Even the Bills that are eventually enacted are often generally-worded versions of earlier drafts, watered down during the negotiation process.

Third, the DPR appears to spend much of its time on non-legislative tasks. Besides having legislative powers, the DPR oversees the executive and the bureaucracy, including by 'monitoring the implementation of legislation and the state budget'.[49] Its members possess powers of 'interpellation, of enquiry, and of expressing opinions' and regularly use them to call state or government officials, judges, and community members

[42] Art 69(3), 2011 Lawmaking Law.

[43] Art 20(5), Constitution; Arts 1(3) and 73(2), 2011 Lawmaking Law.

[44] Art 90(1), 2011 Lawmaking Law. If the laws relate specifically to regional autonomy issues or regional-centre relations, the DPD can be given the task of dissemination.

[45] This is consistently confirmed in domestic and international surveys, including those produced by Transparency International. See <http://www.transparency.org>.

[46] Abi Sarwanto, 'Setahun Bekerja DPR Hanya Hasilkan Tiga Undang-Undang' *CNN Indonesia* (1 October 2015) <http://www.bbc.com/indonesia/indonesia-40678216>.

[47] Dani Prabowo, 'Ini 40 RUU dalam Prolegnas Prioritas 2016' *Kompas* (22 January 2016) <http://nasional.kompas.com/read/2016/01/22/13450911/Ini.40.RUU.dalam.Prolegnas.Prioritas.2016?page=all>; 'Sepanjang 2016, 22 RUU Telah Sah Jadi UU' *Hukumonline* (27 December 2016) <http://www.hukumonline.com/berita/baca/lt5862593001f54/sepanjang-2016--22-ruu-telah-sah-jadi-uu>.

[48] Ridwan Max Sijabat, 'Petty Squabbles Impede Law Making' *Jakarta Post* (24 August 2012).

[49] Art 20A(1), Constitution; Arts 69(1), 70(3), Law 17 of 2014 on Legislative Bodies.

to provide information about an issue of importance to the state.[50] The DPR is also increasingly called on to perform 'fit and proper tests' to fill senior government, administrative, and judicial positions, many of which were discussed in Chapter 1. The DPR has been criticized for prioritizing these functions for largely political reasons, when it should be giving more attention to the deliberation and enactment of essential legislation.

Interim emergency laws

The president can unilaterally issue interim emergency laws (Perpu or Perppu, *peraturan pemerintah pengganti undang-undang*) in 'pressing circumstances'.[51] The literal translation of *peraturan pemerintah pengganti undang-undang* is 'Government Regulation in Lieu of Statute' but in our view 'interim emergency law' is a more accurate descriptor of how these laws function. The literal translation implies a connection with 'government regulations', which are an entirely different type of law, and does not convey the temporary nature of Perpu, which is one of their main features.

Perpus have the formal authority of statutes and can cover the same subject matter as statutes (Article 11 of the 2011 Lawmaking Law) but they remain in force for a limited time. Articles 22(2) and 22(3) of the Constitution require a Perpu to 'obtain the agreement' of the DPR at its next sitting and that if agreement is not reached, then the Perpu 'must be revoked'. As a practical matter, if the DPR approves the Perpu, it will usually pass a statute that asserts that the Perpu is 'converted' to a statute, including the text of the Perpu as an appendix (*lampiran*).

In the post-Soeharto era, at least three legal questions about Perpu have arisen. First, confusion has emerged because Article 22(3) of the Constitution requires that a Perpu not approved by the DPR be revoked. Similarly, Article 52(6) of the 2011 Lawmaking Law states that if the DPR does not approve the Bill, it must be annulled and declared invalid, and that the DPR or president are then to initiate a Bill to revoke the Perpu.[52]

Clearly, some form of positive act of revocation is required. Some Perpu have indeed been expressly revoked by statutes[53] or by a Perpu that was later approved by the DPR.[54] However, in some cases, no positive act has taken place at the DPR's next sitting. Either the DPR or president have not initiated legislation to revoke or approve the Perpu, or the DPR has not otherwise specifically rejected the Perpu. It is unclear whether an interim emergency law remains in force or simply lapses in these circumstances.[55]

Perpu 4 of 2008 on the Financial System Security Net, which the president issued, along with two other Perpu on 15 October 2008, has been particularly controversial. The DPR discussed the Perpu when it sat on 18 December 2008, along with the two other Perpu, which the DPR approved. However, it did not specifically endorse or reject Perpu 4, instead asking the president by a letter sent on 24 December 2008, to introduce a Financial System Security Net Bill. The government did just this in January 2009 and, in one of its closing provisions, sought to invalidate the Perpu. However, the

[50] Art 20A(2), Constitution; Art 73(3), Law 17 of 2014 on Legislative Bodies.

[51] Art 22(1), Constitution.

[52] Art 25(4) of the previous incarnation of the Lawmaking Law—Law 10 of 2004—said that if the DPR rejects the Perpu, it must be revoked by a Bill that the president introduces into the DPR and that the DPR endorses. Presumably, the 2011 Law now allows the DPR to revoke a Perpu by statute without presidential assistance.

[53] For example, Law 26 of 2000 on the Human Rights Courts expressly invalidated Perpu 1 of 1999 on the Human Rights Courts.

[54] For example, Perpu 3 of 1998 on the Revocation of Perpu 2 of 1998 on Freedom to Convey an Opinion in Public.

[55] For further discussion of some of these issues, see Yuli Harsono, 'Polemik Penolakan Perpu JPSK' *Hukumonline* (19 January 2010).

DPR Commission charged with considering the Bill returned it to the legislature after extensive debate, deciding that it could not be finalized before the end of the term of the 2004–09 DPR. On 11 December 2009, the government again introduced a Bill to revoke the Perpu but this was sent back to the DPR by the Commission because it contained an incorrect date. There is, therefore, a real question about whether the Perpu has, by one of these acts, been implicitly revoked, or whether it remains in force—even to this day.[56]

A second legal question surrounding Perpu has been whether the president can subjectively and unilaterally determine whether a 'pressing situation' exists, or whether the situation must satisfy an objective measure. This question has emerged several times before the Constitutional Court in cases where the Court has been asked to review the constitutionality of Perpu. In 2005, the Court initially held that the president had complete and unreviewable discretion to determine whether a situation was 'pressing' and hence to issue a Perpu to address it.[57] This was because the DPR could, at its next sitting, evaluate the president's assessment of the situation, and then decide whether to uphold or annul the Perpu. After all, if the DPR believes that the president has seriously misjudged whether a pressing situation exists, it can quickly convene to annul the Perpu.

However, by 2009, the Court had resiled from this view, holding that there were three preconditions for issuing a Perpu:

1. A pressing situation exists, that is, a pressing need to quickly resolve a legal problem by issuing a statute.
2. The necessary statute does not exist, leaving a legal vacuum; or if the statute exists, it is insufficient.
3. The legal vacuum cannot be filled by enacting a statute using normal procedures because this will take a long time, whereas the pressing situation must be resolved with certainty.[58]

Indeed, the Court invalidated an entire Perpu in 2014, after finding that there was no emergency that compelled the president to issue it.[59] The Court, therefore, now appears willing to invalidate a Perpu by assessing, with the benefit of hindsight, whether the president should have issued it.

A third issue to emerge about Perpu is whether a Perpu's *effect* remains valid once revoked. In mid-2014, just before his second and last presidential term was about to expire, then Indonesian President Susilo Bambang Yudhoyono signed into law a statute on regional government that abolished direct elections for regional heads, prompting a significant backlash that threatened his legacy as a democrat. In response, Yudhoyono moved quickly to issue a Perpu that revoked the abolition and re-established direct regional head elections.[60] This was legally possible because, as mentioned, Perpu are on the same 'level' in the hierarchy as statutes and can, therefore, revoke them. Various legal questions emerged from this scenario. If the DPR rejected the Perpu at its next sitting, would the Perpu's revocation of the abolition have been effective? Would the DPR need to legislate afresh if it wanted to reinstate the abolition? Or, if the DPR rejected the Perpu, would this implicitly

[56] Erman Rajagukguk, 'Kontroversi Masa Berlaku Perppu JPSK' *Kompas* (18 January 2010).

[57] See Constitutional Court Decision 3/PUU-III/2005.

[58] Constitutional Court Decision 138/PUU-VII/2009, para [3.11]. Although the Court did not disclose the source of these three requirements, they appear to have come from a book written by Jimly Asshiddiqie while he was Chief Justice of the Court: Jimly Asshiddiqie, *Hukum Tata Negara Darurat* (Rajawali Pers 2007) 282.

[59] Constitutional Court Decision 1-2/PUU-XII/2014. For a critique of the Court's reasoning in this case, see Butt (n 27).

[60] Perpu 1 of 2014 on Elections for Governors, Regents and Mayors.

revive the statutory provisions the Perpu invalidated? In the event, these questions did not need to be answered because the DPR ultimately approved the Perpu.

Regulations

Like the so-called 'basic laws' of many civil law systems,[61] most Indonesian statutes aim to provide a general legal framework for their subject matter, leaving the regulatory detail to lower-level laws, such as government regulations (*peraturan pemerintah*), presidential regulations (*peraturan presiden*), and ministerial regulations (*peraturan menteri*). According to Damian and Hornick:

> [A]s is customary with the so-called 'basic' laws[62] of Indonesia, these laws function more as policy declarations than as statutory schemes. Implementation usually depends on the enactment of subsequent legislation and the promulgation of special implementing regulations. Until such implementing rules are established, the 'basic' law operates mostly as a statement of national intention.[63]

This raises very significant problems that are widely recognized. Without implementing regulations, the statutes requiring them will usually lie dormant until the regulations are passed. Indonesian courts will not 'fill in the gaps' pending their issuance, which often takes years, if they are issued at all. Worse, some regulations are said to contradict the statute they purport to implement. Below, we discuss the mechanisms for handling such conflicts.

Government regulations

These are usually drafted by ministries or other government institutions and then signed into law by the president.[64] Most of them are issued in response to a specific delegation of power contained in a statute. However, there is debate about whether government regulations depend for their validity or legality upon such a delegation. On one view, a government regulation can only be issued if a statute requires it and the regulation must align with the intention and objectives of the legislation.[65] Yet, it is generally accepted that government regulations can be issued where necessary to implement legislation, even where the legislation itself does not specifically mandate or specify the need for implementing regulations. This appears to be permissible under Article 12(1) of the 2011 Lawmaking Law, which states that:'[t]he subject matter of government regulations is to implement statutes *as appropriate*' (our emphasis).[66]

Some government regulations even appear to be issued absent an express delegation of power or even a statutory reference to a need for further regulation. These regulations appear to derive their legitimacy from statutes that cover subject matter broadly similar to the regulation. Indeed, government regulations commonly list several statutes in their introductory paragraphs, without referring directly to the provision that contains the delegation of power. Questions are rarely raised about the legality or legitimacy of government regulations that take this 'list approach'.

[61] René David and John Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (3rd edn, Stevens 1985) 114.

[62] In pre-*Reformasi* Indonesia some statutes were called 'basic laws' (*undang-undang pokok)* but in post-Soeharto Indonesia the term is rarely used.

[63] Eddy Damian and Robert Hornick, 'Indonesia's Formal Legal System: An Introduction' (1972) 20 *The American Journal of Comparative Law* 492, 511.

[64] See Art 5(2), Constitution, and Arts 1(5), 12, 28(1), and 55(1), 2011 Lawmaking Law.

[65] Tri Jata Ayu Pramesti, 'Bisakah PP Dibentuk Tanpa Ada Perintah UU' *Hukumonline* (7 June 2013).

[66] See also Art 5(2), Constitution, which states that the president is to issue government regulations to implement statutes 'as appropriate'.

Presidential regulations

Like government regulations, presidential regulations are often issued to implement statutes. They can also implement government regulations. Further, they can be used more broadly to 'exercise the power of government' (*menyelenggarakan kekuasaan pemerintahan*).[67] Presidential regulations can, therefore, move beyond mere implementation of statutes or government regulations to regulate 'new' issues if necessary to 'exercise the power of government'. The main limitation on the exercise of this power is that, formally speaking, presidential regulations must not contradict the subject matter of a legal instrument above them on the hierarchy of laws, such as a government regulation or a statute.

Drafting

Government and presidential regulations are both usually prepared and drafted by the ministry with the portfolio to which the regulation primarily relates, or by a relevant non-departmental agency.[68] Both are discussed in an inter-ministerial or institutional committee and are then 'harmonised' by the Ministry of Law and Human Rights—that is, they are assessed for compliance with other laws.[69] Both are 'stipulated' (*ditetapkan*)—that is, signed into law—by the president.

In exercising these regulatory powers, the president is assisted by two bodies: the State Secretariat and the Cabinet Secretariat. The State Secretariat, which is a ministry, prepares analysis and provides administrative and technical support to the president and vice-president.[70] This includes analysis of, and support for, preparing and completing draft legislation, interim emergency laws and government regulations, and advising the Cabinet Secretary about draft presidential regulations.[71] In performing these functions, the State Secretariat Minister is assisted by the Deputy for Law, who is responsible for: monitoring drafting processes; providing legal opinions about the substance of draft legislation, interim emergency laws and government regulations; providing the official numbered titles for these laws after the president signs them; and then distributing those laws.[72]

The Cabinet Secretariat also provides administrative and technical support and assistance to the president.[73] Like the State Secretariat, the Cabinet Secretariat assists the president with lawmaking processes. However, the role of the Cabinet Secretariat appears to be more direct: preparing initiatives, drafting and conveying draft presidential regulations, decisions, and instructions.[74] In performing these tasks, the Cabinet Secretary is assisted by a Deputy for Politics, Law and Security.

Regional regulations (Perda)

As discussed in Chapter 3, Indonesia embarked upon a process of radical decentralization in 2001, under which significant central government power has been devolved to Indonesia's thirty-four provincial and more than 500 city and county governments. Each of these governments has their own legislatures with power to produce regional regulations (Perda or *Peraturan Daerah*). Also granted lawmaking powers were heads of the executive arm of regional governments—governors (in provinces), regents (in counties), and mayors

[67] See Arts 1(6) and 13, 2011 Lawmaking Law.
[68] Arts 28(1) and 55(1), 2011 Lawmaking Law.
[69] Arts 54(1), 54(2), and 55(2), 2011 Lawmaking Law.
[70] Art 2, Presidential Regulation 58 of 2010 on the State Secretariat Ministry.
[71] Art 3(b), Presidential Regulation 58 of 2010 on the State Secretariat Ministry.
[72] Arts 62–64, Presidential Regulation 58 of 2010 on the State Secretariat Ministry.
[73] Art 2, Presidential Regulation 82 of 2010 on the Cabinet Secretariat.
[74] Art 3(c), Presidential Regulation 82 of 2010 on the Cabinet Secretariat.

(in cities). These regional heads can issue regional head regulations (*Perkada*, or *Peraturan Kepala Daerah*), primarily to implement Perda.

We discuss these lawmaking powers and their limits in Chapter 3. We note here, however, that Chapter IX of Law 23 of 2014 on Regional Government covers Perda. They are created by the relevant regional legislature with the joint approval of the regional head (Article 236(2)), although Bills can be initiated by either the DPRD or the regional head (Article 240(2)). Article 236 states that Perda should be directed towards 'implementing regional autonomy'—that is, addressing matters over which the 2014 Regional Government Law grants local governments jurisdiction. Perda can also contain 'further elaborations' of provisions of higher-level laws (Article 236(3)(b)) and provide 'local content' to other laws (Article 236(4)).

Some types of Perda, including those stipulating or amending a local government budget, need pre-approval from a higher level of government (Article 245). All Perda are susceptible to invalidation for contradicting higher-level laws, the public interest and/or morality (Article 250), although, this has rarely happened. As we explain in Chapter 3, the central government previously held power to do this but post-enactment Perda review and invalidation now falls within the exclusive jurisdiction of the Supreme Court.

OPERATION OF THE HIERARCHY

The hierarchy of laws was set out at the beginning of this chapter. It is in Article 7(1) of the 2011 Lawmaking Law, supplemented by Article 8. The hierarchy is much-criticized in Indonesian legal circles for being incomplete and unclear in its operation. We outline the primary critiques of the hierarchy here.

Commonly used legal instruments not included in the hierarchy itself

The hierarchy does not contain an exhaustive list of commonly used legal instruments. Commonly employed instruments that do not appear in the hierarchy include those in Table 2.2 below.

The incompleteness of the hierarchy is acknowledged in Article 8(1) of the 2011 Lawmaking Law, which refers to types of laws not referred to in Article 7(1) but that are used within the Indonesian legal system. These include regulations (*peraturan*) stipulated by the MPR, the DPR, the DPD), the Supreme Court, the Constitutional Court, the National Audit Agency, the Judicial Commission, Bank Indonesia, ministers, government institutions and commissions, regional legislatures, governors, mayors, regents, and

Table 2.2 Common abbreviations for Indonesian laws

Type of law	Indonesian	Common abbreviation
Presidential decision	*Keputusan Presiden*	KepPres
Presidential instruction	*Instruksi Presiden*	InPres
Ministerial regulation	*Peraturan Menteri*	PerMen
Ministerial decision	*Keputusan Menteri*	KepMen
Ministerial instruction	*Instruksi Menteri*	InMen
Director General regulation	*Peraturan Direktur Jenderal*	PerDirJen
Director General decision	*Keputusan Direktur Jenderal*	KDirJen
Joint ministerial letter	*Surat Keputusan Bersama Menteri*	SKBMenteri

even village heads. Under Article 8(2), these types of laws are recognized and have binding legal force, provided they are required by higher-level laws or are otherwise issued under 'legitimate authority'—that is, authority provided by law to perform particular functions of government.

Critically, however, the precise legal authority of the types of laws given legal authority by Article 8 is unclear, especially viz-à-viz laws that *are* listed on the hierarchy but also vis-à-vis each other. This is a very significant problem because Indonesia is notorious for having inconsistent laws issued by different institutions and officeholders, leading to significant confusion about which law to follow. Yet the 2011 Lawmaking Law says nothing about which type of law prevails over the other if inconsistency occurs.

This spawns huge uncertainty among the Indonesian legal and political community. One important question is the extent, if any, to which the relatively authority of a law (including those appearing on the hierarchy) should be determined by the status of the law that authorized it. Take for example, a Perda and a presidential regulation that both concern the management of hospitals. Following the hierarchy, the presidential regulation prevails to the extent of any inconsistency. However, if the presidential regulation was issued under express delegation from a government regulation, and the Perda under a statute, would the presidential regulation still prevail? On the hierarchy, the statute that authorized the Perda has greater weight than the government regulation under which the Perda was issued. To our knowledge, there is simply no authoritative answer to this question.

Commonly used instruments not mentioned in Articles 7 and 8

Also causing great confusion is the absence in Articles 7 and 8 of the 2011 Lawmaking Law of commonly employed legal instruments. Particularly conspicuous omissions are the various types of laws promulgated by the president. Indonesian presidents have long issued a variety of instruments other than 'presidential regulations' (which, while listed in the hierarchy, is a relatively new type of law). These include 'presidential instructions' (*instruksi presiden*, or *Inpres*), which are usually authoritative statements of commitment or intent,[75] and presidential decisions or decrees (*keputusan presiden* or *dekrit presiden*). Indonesia's first president, Soekarno, was also renowned for issuing presidential stipulations (*penetapan presiden*) or edicts (*maklumat*). The relative authority of these types of presidential instruments—if they have any real legal force at all—remains unclear.

Decisions versus regulations

A further issue of uncertainty is the relative authority of decisions (*keputusan*) vis-à-vis regulatory instruments (*peraturan*). None of the instruments on the hierarchy are 'decisions', but decisions are very commonly issued in Indonesia, particularly by the president and government ministers. Decisions are usually formal administrative determinations about a particular issue, such as the formalization of a work plan, or the appointment and dismissal of particular public officeholders, whereas regulations are typically broader in scope and contain rules that apply generally. These types of instruments have been used inconsistently, however, with decisions, in particular, commonly used to 'regulate'.[76]

[75] For example, presidents have sometimes used *Inpres* to call on the DPR or relevant ministries to issue a particular law or otherwise address a pressing matter. An Inpres was, for example, used to declare and then extend the Moratorium on Forest Concessions and Improved Management of Primary Natural Forest and Peatlands: see Presidential Instructions 10 of 2011 and 6 of 2013.

[76] Jimly Asshiddiqie, *Perihal Undang-undang* (Rajawali Pers 2010) 9–11.

Unfortunately, the 2011 Lawmaking Law does not specify the relative authority of decisions and regulations. Instead, it states that decisions of ministers, governors, mayors, and other officials issued before the 2011 Lawmaking Law came into force, and which purport to regulate, must be 'given the meaning of a Regulation' (Article 100). This creates more problems than it solves. For example, is a presidential decision, which, as mentioned, is not included on the hierarchy, now to be considered on par with a presidential regulation, which is mentioned on the hierarchy? There is simply no answer to this question.

Case study: ministerial regulations

Ministerial regulations bring many of the uncertainties surrounding the hierarchy into sharp relief. Ministerial regulations are among the most commonly used national regulatory instruments. However, they are not included in the hierarchy, apparently obtaining their legal authority from Article 8(1) and (2) of the Lawmaking Law (discussed above). They provide significant flexibility for ministers, in practice allowing them to regulate almost anything that falls within their portfolios.[77] Unlike government regulations and presidential regulations, there appears to be minimal, if any, opportunity for external scrutiny of ministerial regulations from other government departments and agencies, let alone civil society, before issuance. Because they are not specifically mentioned on the hierarchy, there is significant uncertainty about the status of ministerial regulations vis-à-vis laws mentioned on the hierarchy. There is, of course, even more uncertainty about their status relative to laws not listed on the hierarchy.

The strength of ministerial decrees compared with regional regulations (Perda) has been much debated. This issue emerges regularly as national ministries (including the Ministry of Home Affairs, which oversees regional autonomy) seek to regulate aspects of local government but are met with resistance from local government administrations, who pass their own laws contrary to those issued by the national ministries. Different actors have voiced different views about whether ministerial regulations should prevail over Perda, or vice versa. On the one hand, some local government officials have sought to ignore ministerial regulations, emphasizing that they are not mentioned in the hierarchy.[78] The correctness of this view is doubtful because it ignores Article 8(1) and 8(2) of the 2011 Lawmaking Law, which states that types of laws stipulated by ministers 'have binding legal force provided they are required by higher-level laws'.

On the other hand, others, including Indonesia's National Legal Development Agency (*Badan Pembinaan Hukum Nasional*, BPHN), suggest that ministerial regulations should prevail over Perda and should perhaps even be treated as sitting between presidential regulations and Perda on the hierarchy. Proponents of this view emphasize that ministers are senior officials recognized under Article 17 of the Constitution, and appointed by a directly elected president to help administer the government.[79] The laws ministers produce should, therefore, carry significant weight. They also point out that ministerial power has a far wider geographic reach than local government power. Ministerial regulations apply across Indonesia and should, therefore, override Perda, which are limited by the territorial jurisdiction of the government that issues them.[80] This view appears to be supported by the

[77] See Elucidation to Art 8(1), 2011 Lawmaking Law.

[78] Giorgio Budi Indrarto and others, 'The Context of REDD+ in Indonesia' (Center for International Forestry Research (CIFOR) 2012) 28.

[79] Noor M Aziz, *Laporan Akhir Pengkajiaan Hukum Tentang Eksistensi Peraturan Perundang-Undangan di Luar Hierarki Berdasarkan UU No 10 2004 Tentang Pembentukan Peraturan Perundang-Undangan* (Pusat Penelitian dan Pengembangan Sistem Hukum Nasional Badan Pembinaan Hukum Nasional Kementerian Hukum dan HAM RI 2010) 51–55.

[80] ibid 54.

Justice and Human Rights Minister, who has issued a directive declaring that ministerial regulations and decisions prevail over Perda.[81]

However, these arguments based on seniority and territorial scope are not strong. They ignore the fact that the Constitution grants no lawmaking powers to ministers but does expressly grant them to local governments.[82] Further, unlike ministers (who are appointed by the president from outside the legislature and are not elected representatives), local lawmakers, whether legislative or executive, are directly elected by constituents. Their local democratic legitimacy is therefore much stronger than ministers'. Also, there is no reason why a law's relative strength should be determined by its geographical reach. Finally, the Human Rights Minister directive that purports to elevate ministerial instruments over Perda is simply not supported by the hierarchy, which, as mentioned, does not specify the precise status of ministerial regulations. In other words, the directive purports, in effect, to add a legislative norm. Given that the hierarchy is contained in a statute, it must prevail over the directive, at least to the extent of this inconsistency.

Perda v Forestry Minister Decrees

The debate over the relative authority of ministerial instruments is far from academic, and has led to significant uncertainty and contest across many areas of Indonesian law. Here, we present just one example.

In the early days of decentralization, many local governments in forest-rich areas used their new lawmaking powers to issue Perda allowing themselves to grant logging concessions and to authorize other types of commercial forest activities.[83] Some local governments did this under Government Regulation 6 of 1999, which expressly granted authority to them to issue various concessions, albeit limited in scope.[84] Deforestation rates markedly increased, with local governments issuing hundreds, if not thousands, of concessions. Many exceeded the limits imposed by the regulation, and some even overlapped with permits issued by the national government.[85] In response, the Forestry Ministry sought, by decree, to wind back the concession-granting powers of local governments and even to expressly prohibit governors, regents, and mayors from issuing some types of permits.

An important legal question was whether the Ministry could, by decree, invalidate logging permits issued by Perda, particularly given that the Perda drew their legitimacy from a higher-level law—the 1999 Government Regulation—which appeared to formally override ministerial regulations. This legal question was not resolved and, for the most part, local governments largely ignored the Forestry Ministry decrees. It was not until the central government replaced the 1999 Government Regulation with Government Regulation 34 of 2002 that most of them ceased awarding these concessions.[86] The 2002 Regulation essentially recentralized regulatory control over the harvesting, processing, and marketing

[81] Circular Letter (*Surat Edaran*) dated 23 February 2001, cited in Maria Farida Indrati, *Ilmu Perundang-undangan: Jenis, Fungsi, dan materi Muatan* (Kanisius 2007) 94.

[82] Art 18, Constitution.

[83] Christopher M Barr, *Decentralization of Forest Administration in Indonesia: Implications for Forest Sustainability, Economic Development, and Community Livelihoods* (Center for International Forestry Research 2006) 88, 99.

[84] Governors could, for example, issue rights over forest areas less than 10,000 ha (Art 11(2), Government Regulation 6 of 1999) and regional governments up to 100,000 ha per province in most parts of Indonesia (Art 8(1)(a)–(b)). County heads (*bupati* or 'regents') were permitted to issue forest 'harvesting' concessions (Arts 1(17), 22(1), and 22(3)) over a 100 ha area for one year (Art 24(1)) or for 'a certain amount' (Art 24(1)(b)).

[85] Indrarto and others (n 80) 27–28; Barr (n 85) 89.

[86] Government Regulation 34 of 2002 on Forestry Administration and the Formulation of Plans for Forest Management, Forest Utilization and Use of Forest Estates: Barr (n 85) 91.

of timber products, retaining scope for governors, regents, and mayors to issue relatively small concessions.[87]

Delegation of lawmaking power

Effect of repeal of authorizing law

As mentioned, most Indonesian statutes require the government to issue further regulations (commonly referred to in Indonesia as 'implementing regulations' or *peraturan pelaksanaan*), usually to flesh out the details of broad declarations of policy contained in those statutes. Even these implementing regulations themselves sometimes require their own implementing regulations. For example, it is very common for a statute to require a government regulation, and for that government regulation itself to then require another instrument, such as a ministerial regulation, for its own implementation.

One question that arises in practice is: if the statute (or other type of law) that delegates power to issue implementing regulations is itself invalidated, revoked, or amended, does this affect the validity of the implementing regulation? Take for example, a statute that directs the government to issue a government regulation. If that statute is revoked, does the government regulation also lose legal effect? Or, once enacted under a grant of authority, does the government regulation have legal force independent of the delegating instrument?

The Supreme Court has, in several cases, considered whether regulations remain in force if the laws upon which they appear to rely for their legal authority are revoked.[88] In a 2012 case,[89] for example, the Supreme Court famously invalidated Presidential Decision 3 of 1997 on the Control and Supervision of Alcoholic Beverages because 'higher laws' that the Decision cited as its legal bases had been revoked. This challenge was brought by the Islamic Defenders Front (FPI), a conservative, Islamist vigilante group known for its protests, sometimes violent, against perceived violations of Islamic law, including the serving and consumption of alcohol. They challenged the decision on various grounds, including that it no longer had a basis in laws higher on the hierarchy. In addressing this argument, the Court listed the various laws contained in the preamble of the decision—a constitutional provision, four statutes, four government regulations, and one presidential decision. It found that two of these statutes and two of these government regulations had been revoked or significantly amended. This, for the Court, was sufficient to conclude that the entire 1997 Presidential Decision no longer had a legal basis.

In our view, this decision was not convincing, and adds even further confusion and uncertainty. First, the Court did not attempt to account for the constitutional provisions, two statutes and two government regulations *not* invalidated which, presumably, could still have provided higher-level legal bases for the presidential decision. Second, the Court did not consider whether the laws that replaced those cited in the preamble in fact had the same subject matter as the older laws, or even touched on any of the subject matter of the presidential decision under review. For example, the Court held that the 1974 Regional Government Law, which the presidential decision included in its preamble, had been replaced by the 2004 Regional Autonomy Law. However, the Court did not mention how this was relevant and whether, in particular, the replacement statute affected the president's power to regulate how alcohol was distributed.

Third, the Court also concluded that the presidential decision contradicted three other statutes. Yet the Court specified neither which parts of the presidential decision

[87] ibid 32.

[88] As discussed in Chapters 3 and 4, the Supreme Court has jurisdiction to review lower-level laws to ensure that they do not contradict higher-level laws.

[89] Supreme Court Decision 42/P/HUM/2012.

contradicted which parts of the statutes, nor how they conflicted. In our view, this probably reflects the underdeveloped nature of the Court's 'conflict jurisprudence', discussed later in this chapter. Finally, only a few years earlier, in Decision 25/P/HUM/2008, the Supreme Court had invalidated a Perda that prohibited the distribution and sale of alcoholic beverages for contravention of Presidential Decision 3 of 1997—the very law it declared invalid in this 2012 case. However, in 2008, the Court had raised no questions about the validity of the presidential decision.

Uncertainties

A statute will, in its closing provisions, often specify other statutes and laws that are revoked or otherwise affected by its passage. Take, for example, the 2009 Coal and Mineral Mining Law, Article 173(1) of which, as mentioned above, states:

> When this Law comes into force, Law 11 of 1967 on Mining … is revoked and is declared to be no longer in force.

Uncertainties arise when a law does not mention laws affected by its passage. Article 173(2) of the 2009 Mining Law provides an example of this. It states:

> When this Law comes into force, all laws which are implementing regulations of Law 11 of 1967 on Mining are declared to remain in force provided that they do not conflict with provisions in [this] statute.

Many, if not most, Indonesian statutes contain a statement like this. However, they are highly problematic because they leave two tasks to government, businesses, and citizens: first, to determine whether a particular subordinate law is in fact an 'implementing regulation'; and, second, whether that implementing regulation is consistent with the new statute.[90] Given that there are no established principles or guidelines to determine whether two instruments are consistent with each other, the result is significant confusion and, ultimately, disagreement about which lower-level laws have been affected by any given statute.[91]

Effect of deadlines for implementing regulations

In more recent years, some statutes have contained deadlines by which implementing regulations must be issued. So, for example, Indonesia's 2014 Trade Law required all implementing regulations to be issued within two years of its enactment.[92] However, these statutes rarely impose any consequences for breaching those time limits. This creates a risk that the limits will be ignored and that the statutory provisions will remain unimplemented and hence largely inoperable.

It bears noting, however, that, in one case at least, the Constitutional Court has decided that consequences do, in fact, flow from the government's failure to issue regulations within deadlines established by statute. In the *MK Perpu* case (2014),[93] the Court was asked to consider the consequences of a three-month deadline, imposed by a statute, passing without implementing regulations being issued. For the Court, issuing these regulations was mandatory under the statute and failing to meet the deadline therefore carried legal consequences. The Court held that, if delegated regulatory authority was not exercised within a mandated period, then that delegated authority would expire.[94]

[90] Simon Butt and Nicholas Parsons, 'Judicial Review and the Supreme Court in Indonesia: A New Space for Law?' (2014) 97 *Indonesia* 55–85.
[91] ibid. [92] Art 121, Law 7 of 2014 on Trade.
[93] Constitutional Court Decision 1-2/PUU/XI/2014.
[94] Constitutional Court Decision 1-2/PUU/XI/2014, p. 114.

The Constitutional Court's decision in this case was issued in highly exceptional circumstances and, in our view, is undesirable and should not be applied in future.[95] If the purpose of having deadlines is to encourage the government to issue regulations so that the statute can become operative, then this decision appears to defeat it. Indeed, the decision has the opposite effect, rendering the statute inoperative if the implementing regulation is not issued within time, as very often happens in Indonesia. If the legislature wants consequences to flow from failure to meet the deadline, it should specify those consequences. Alternatively, of course, the legislature could enact more detailed statutes, hence reducing the reliance upon implementing regulations in the first place.

Resolving conflicts

Conflicts between laws of different levels

Conflicting laws are often explained by Indonesian lawyers and politicians as indicating the incompetence of lower-level lawmakers, who simply fail to consider higher-level laws when passing their own laws. While this critique has some merit, it misses the point that many executive governments and legislatures the world over seek to expand their power through regulation and administrative action and simply by doing so they inevitably test the limits of their formal authority.[96] Governments may be motivated to test these limits by ulterior intent, such as to secure benefits for themselves or their institutions. However, they might also be well-intentioned, seeking to test existing rules in an attempt to provide benefits to citizens or improvements to governance systems.[97]

Conflicting or overlapping laws might also result from inadvertence, resulting from an overly complex legal system. Indonesia has such a system, with many thousands of lawmakers who, between them, issue many thousands of laws. There may now be so many laws 'on the books' that passing new laws without intruding on others is almost impossible. It might be too difficult for drafters to obtain all of these laws, let alone read them, to avoid producing a law that conflicts with them.

There are two primary means by which conflicts between laws can be resolved. The first involves one of the bodies or individuals responsible for issuing an inconsistent law removing the inconsistency. They might, for example, revoke or amend it. However, this appears rarely to happen in Indonesia, probably because lawmakers are reluctant to 'back down' or otherwise appear subservient when pressured to exercise their lawmaking powers in a particular way.

The second way to remove conflicts is through judicial review. As discussed in Chapter 4, the Indonesian Supreme Court has the power to review lower-level laws to ensure their consistency with higher-level laws. During the Soeharto period, the Court very rarely exercised this power, often citing technicalities. Indeed, until 2011,[98] the Court itself imposed a 180-day time limit on the lodgement of judicial review applications, running from the date the law was enacted.[99] This time limit was usually strictly enforced, and precluded many challenges.[100] In any event, the Court's jurisdiction appears to be limited to hearing

[95] The decision was controversial, with the Court being criticized for seeking to protect its own interests and being overly defensive: Butt (n 27). The Perpu had sought to tighten the prerequisites for serving on the Court and to allow greater external scrutiny of the Court's practices and decision-making in the aftermath of the Akil Mochtar scandal, discussed in Chapter 5.

[96] Simon Butt and Tim Lindsey, 'Unfinished Business: Law Reform, Governance and the Courts in Post-Soeharto Indonesia' in Mirjam Kunkler and Alfred Stepan (eds), *Indonesia, Islam and Democratic Consolidation* (Columbia University Press 2013).

[97] ibid. [98] Supreme Court Regulation 1 of 2011 was issued to remove the 180-day limit.

[99] Butt and Parsons (n 92) 71–72.

[100] Butt, 'Regional Autonomy and the Proliferation of Perda in Indonesia: An Assessment of Bureaucratic and Judicial Review Mechanisms' (2010) 32(2) *Sydney Law Review* 177.

only some of the many types of disputes that could emerge from the hierarchy. Alarmingly, there is legal debate about whether the Supreme Court can only review lower-level laws against statutes (which seems to be supported by the Constitution and various judiciary statutes), or whether it can also review lower-level laws against each other (which the Court's own procedural guidelines appear to accommodate).[101] This debate is largely unresolved. In some cases, the Court has thrown out review applications concerning conflicts between lower-level laws, but in others, it has agreed to hear them.[102]

Conflict jurisprudence

Some of the Court's decisions have been relatively uncontroversial. In the *Receivers' Fees* case (2013),[103] for example, the Court heard a challenge to a Law and Human Rights Ministerial Regulation that determined, inter alia, who would pay receivers' fees if a declaration of bankruptcy was overturned. According to Article 2(1)(c) of the Regulation, the person who applied for the declaration of bankruptcy would have to pay them. By contrast, Article 75 of Law 37 of 2004 on Bankruptcy and Suspension of Debt Payments left it entirely to the panel of judges issuing the declaration to allocate the costs between the applicant and the debtor. Article 76 then stated that a ministerial decision could stipulate guidelines to determine these fees. For the Court, these provisions of the ministerial regulation and the 2004 Law were inconsistent. While the Law authorized the minister to help determine how much to pay, it did not authorize the minister to determine who would pay. This was a matter for the court.

However, being in its infancy, the Court's 'conflict jurisprudence' is undeveloped and appears ill-equipped to handle more complex cases. In many countries, large and sophisticated bodies of law and jurisprudence have been developed to help assess whether laws are consistent with each other. Indonesia is not one of these. Its judges and scholars have, to our knowledge, provided very little, if any, explanation about what constitutes a 'conflict' between laws. If two laws simply cover the same broad subject matter as each other, will they conflict, even if they are quite different? If, for example, two laws deal with the distribution of alcohol, will they necessarily conflict if they regulate different aspects of distribution? Will an implementing regulation be inconsistent with its broadly worded authorizing statute simply because it adds administrative details or requirements not mentioned in that statute? Or is this simply to be expected, given the purpose of the implementing regulation is to 'fill in the gaps' left by the statute?

Some of these gaps and the problems they cause are illustrated by several decisions about a 2012 Minister of Energy and Mineral Resources Regulation.[104] This regulation, issued on 6 February 2012, required mining companies to begin processing raw minerals in Indonesia before exporting them, from 6 May 2012. It was not well received by participants in the mining industry in Indonesia, including investors, who feared significant increases in their processing costs. Several applications challenging the legality of this regulation were brought before the Supreme Court by industry associations and others, arguing that it contradicted Indonesia's 2009 Coal and Mineral Mining Law. Article 170 of this Law requires onshore processes 'within five years' after the Law came into force, that is, by 12 January 2014. The Court agreed that the ministerial regulation and the Law conflicted and invalidated the regulation. While this decision was lauded by mining companies and industry associations, the decision raises concerns about what the Supreme Court might

[101] Butt and Parsons (n 92).
[102] ibid. [103] Supreme Court Decision 54/P/HUM/2013.
[104] Minister of Energy and Mineral Resources Regulation 7 of 2012, as amended by Minister of Energy and Mineral Resources Regulation 11 of 2012, cited in Florence Gracia Santoso, 'New Developments for the Indonesian Mining Industry' *SSEK Lawfirm Blog* (15 February 2013).

consider to be a 'conflict'. Article 170 of the Law sets a deadline *before* which onshore production must begin, not a date *upon* which it must begin. The implementing regulation, by setting an earlier deadline, does not contravene Article 170. The Court also found fault with the legal instrument the minister had chosen to implement the 2009 Mineral and Coal Mining Law. Article 103(3) of the Law required that further detail about the processing and export of minerals was to be provided in a government regulation. However, the minister had chosen to do this by issuing the regulation.

Resolving conflicts between laws of the same type

In Indonesia, principles of interpretation exist to help resolve inconsistencies between statutes when judges must choose between those statutes. One of these is *lex specialis derogat lex generalis*. According to this principle, if two inconsistent laws apply to the case at hand, the more specific of the two overrules the law of more general application. Another is *lex posteriori derogat lex priori*. Under this rule, if two laws conflict with each other, then the more recently enacted law prevails.

However, these principles are notorious for being inconsistently applied.[105] They also seem to operate only to help resolve disputes over laws that emanate from a single source: the national legislature. It is unclear whether these principles can be applied to resolve inconsistencies between laws issued by other institutions or levels of government. If, for example, different ministers issued contradictory laws, could the latter implicitly repeal the former? Would the more specific of the two prevail? Or should the interpretative methods used to resolve these types of inconsistencies be different to those used in statutory interpretation? The hierarchy does not answer these questions.

The hierarchy also does not touch upon the relative authority of regional government bylaws. It does not, for example, explain whether regional regulations or Perda enacted by the legislature of one region will trump those issued by the executive government of the same region. Instead, the answer to this question appears in the 2014 Regional Government Law. Article 246(1) grants power to the executive arm of regional government to implement Perda by issuing regulations or decisions.

Another significant unresolved issue is whether the Perda of one city or county need be consistent only with the Perda of the provincial government area in which it is located, or with Perda issued by any of Indonesia's thirty-four provincial governments. Given that the jurisdiction of local governments, whether provincial, city, or county, appears to be limited to their respective geographical territories,[106] it appears that sub-provincial governments need only consider the laws produced by their own provincial governments. Yet, the hierarchy does not clearly stipulate this.

Sectoralism

An objective reading of the hierarchy appears to require citizens and government to comply with all of the laws mentioned in Article 7(1), and those instruments given legal force by virtue of Article 8(2). Yet it is often said that government officials tend to ignore laws that are not expressly directed at the fields or sectors in which they work.

Take, as a hypothetical example, two ministries whose portfolios overlap to some extent: the Environment and Forestry Ministry on the one hand, and the Energy and Mineral Resources Ministry on the other. Following the hierarchy, both ministries would appear to be required, under Article 7(1), to comply with—at the very least—the Constitution,

[105] Butt and Lindsey (n 8). [106] See Arts 13 and 14, 2004 Regional Government Law.

and all national statutes, government regulations, and presidential regulations. Ministerial regulations, too, would appear to have force of law by virtue of Article 8(2) of the 2011 Lawmaking Law, though their precise status vis-à-vis other laws on the hierarchy is unclear, as mentioned above. Prima facie, then, a regulation of the Environment and Forestry Ministry aiming to lower carbon emissions from deforestation by prohibiting open-pit mining in particular areas would appear to bind all, including the Energy and Mineral Resources Ministry and its officials. However, in practice, officials from the Ministry of Energy and Mineral Resources are highly likely to look only to regulations and decisions of their ministry when performing their functions and not those issued by the Environment and Forestry Ministry, even if Environment and Forestry Ministry regulations and decisions relate to their work.

This sectoral outlook is also said to affect adherence to national statutes that seek to regulate a particular field. One ministry is unlikely to pay regard to a statute that is primarily directed at regulating the portfolio of another. Environment and Forestry Ministry officials, then, are likely to have primary reference to the Environmental Management Law and the Forestry Law, rather than the Mining Law, when performing their functions, even though the Mining Law might regulate a matter that falls within the ambit of their responsibilities. The primary exception to this is when provisions of legislation regulating one sector direct a minister with responsibility over another sector to assume responsibly over a specific matter or to regulate it.

3

Decentralization

INTRODUCTION

As discussed in earlier chapters, Indonesia had an authoritarian system of government from at least 1959, for decades. Its most recent transition towards democracy began soon after President Soeharto stepped aside in 1998, amid economic crisis and violent unrest across the country.[1] The following year, Indonesia held its first free and fair elections since 1955. With the continuing threat of escalating violence, and even the 'Balkanization' of Indonesia, members of the national legislature chosen in these elections in 1999 felt compelled to meet demands for change that had emerged during Soeharto's rule and had precipitated his fall.[2] One of the most prominent demands was for decentralization, or 'regional autonomy' (*otonomi daerah*) as it is usually called in Indonesia.

Regional autonomy was important not only because of the anticipated improvements in governance standards created by 'bringing government closer to the people'[3] but also because it helped assuage increasing resentment towards the strongly centralized system established during the Soeharto period. Different regions expressed different grievances. Some complained about the central government's interference in their affairs and its refusal to allow them to follow long-standing local governance traditions. Others said the central government was predatory, or at least exploitative, keeping for itself the lion's share of the spoils from the exploitation of natural resources located in their provinces. Yet others claimed to be so ideologically, culturally, or religiously different from other parts that they just did not 'belong' in Indonesia. Local figures in Aceh, for example, sought a greater role for Islamic law in the province; Papuans and East Timorese, many of whom are Christians and ethnically distinct from many other Indonesians, claimed on historical grounds that they should never have been made part of Indonesia and only joined because of military threat.

During the Soeharto period, the central government could resist these objections, drawing on ideology and military force.[4] However, with the fall of Soeharto came the 'fading'[5] of the ideological pillars of the regime and a reduction of the military's role in politics. Within a few years of Soeharto's fall, many reformist demands had been met, at least on paper, with a swathe of statutory and constitutional enactments intended to dismantle key components of authoritarianism.[6] Many of these—including those relating to the judiciary and human rights—are discussed in other chapters of this book. As for regional

[1] Indonesia was subject to a largely democratic system under the 1949 Constitution. This was largely suspended in 1957 and formally ended in 1959, when President Soekarno decreed a return to the executive-heavy 1945 Constitution, as discussed in Chapter 1.

[2] This was not problematic for legislators who had been in opposition during Soeharto's reign. But even former members of the New Order elite who were re-elected recognized that they needed to support key reforms to avoid further unrest and 'save themselves': Donald L Horowitz, *Constitutional Change and Democracy in Indonesia* (Cambridge University Press 2013) 34; Harold Crouch, *Political Reform in Indonesia after Soeharto* (ISEAS 2010) 7.

[3] Vito Tanzi 'Fiscal Federalism and Decentralization: A Review of Some Efficiency and Macroeconomic Aspects', in *Annual World Bank Conference on Development Economics* (World Bank 1995) 295.

[4] Adnan Buyung Nasution, *The Aspiration for Constitutional Government in Indonesia: A Socio-Legal Study of the Indonesian Konstituante, 1956–1959* (1st edn, Pustaka Sinar Harapan 1992).

[5] Sarah Waddell, 'Shifting Visions of the Social and Legal Order in Indonesia: Implications for Legislative Style and Form' (2005) 7 *Australian Journal of Asian Law* 43.

[6] Nadirsyah Hosen, *Human Rights, Politics and Corruption in Indonesia: A Critical Reflection on the Post Soeharto Era* (Republic of Letters 2010).

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autonomy, statutes were enacted in 1999, granting local governments extensive powers to govern their own affairs, including by issuing bylaws, commonly called Perda (*peraturan daerah*, usually translated as 'regional regulations').

The basic features of Indonesia's decentralized system are now provided in Article 18 of the Constitution, which reads:

1. Indonesia is divided into provinces (*propinsi*); provinces are divided into counties (*kabupaten* or 'regencies') and cities (*kota* or 'municipalities'). Each province, county, and city has its own regional government, regulated by statute.
2. Provincial, county, and city governments regulate and administer matters of government themselves under the principles of autonomy and assistance [to other tiers of government] (*pembantuan*).
3. Provincial, county, and city governments have Regional People's Representative Councils (*Dewan Perwakilan Rakyat Daerah,* DPRD), whose members are voted in by general election.
4. Governors, Regents, and Mayors are the heads of provinces, counties and cities respectively and are to be democratically elected.
5. Regional governments are to exercise the broadest possible autonomy, except in matters that national legislation reserves for the Central Government.
6. Regional governments have power to enact regional regulations (*Perda*) and other regulations in exercising their autonomy and assistance.
7. The structures and procedures for the administration of regional government are to be regulated by statute.

The Constitution thus gives regional governments broad autonomy and the right to issue Perda and other regulations to exercise this autonomy. But statutes enacted in 2004 and 2014 have progressively chipped away at this broad grant of power, as discussed later in this chapter.

Provincial, city, and county legislatures have power to: issue Perda for the purposes of regional autonomy; to perform tasks given to them by a higher level of government; and to implement higher-level laws (Article 236(3)(a)–(b)) of Law 23 of 2014 on Regional Autonomy, as amended by Law 9 of 2015. In addition, a Perda can 'contain local content material in accordance with the law' (Article 236(4)), although precisely what this entails is not explained. Perda can also impose criminal sanctions of up to six months' imprisonment or a Rp 50 million fine (Article 238(2)) and administrative sanctions, including suspending activities and licences, terminating licences, issuing fines and the like (Article 238(5)). Heads of the executive arm of regional governments—that is, governors (in provinces), regents (in counties), and mayors (in cities)—can issue Perkada (*peraturan kepala daerah*, regional head regulations) to implement Perda or if required by law (Article 246(1)). A civil police unit (*pamong praja*) can be established to help the regional head enforce these laws (Articles 255–56).

Indonesia has a very large number of subnational governments. This number has increased as provinces, counties and cities have split,[7] as Table 3.1 demonstrates.

We discuss decentralization and how it affects various areas of law in other chapters of this book. For example, in Chapter 2, we discuss the disorder that Perda have injected into the legal system; in Chapters 7, 8, and 18, we discuss overlapping national and subnational government jurisdictions in land law, environmental law and foreign investment, and the various problems this causes in those areas of law. In this chapter, however, we describe

[7] Anne Booth, 'Splitting, Splitting and Splitting Again: A Brief History of the Development of Regional Government in Indonesia since Independence' (2011) 167(1) *Bijdragen tot de Taal-, Land- en Volkenkunde* 31.

Table 3.1 Units of government administration in Indonesia 1980–2013

Administrative level	1980	1985	1990	1995	2000	2005	2010	2013
Province (*propinsi*)	27	27	27	27	26	33	33	34
District (*kabupaten*)	246	246	241	243	268	349	399	413
City (*kota*)	54	55	55	62	73	91	98	98
Subdistrict (*kecamatan*)	3,349	3,539	3,625	3,844	4,049	5,277	6,699	9,982
Village (*desa*)	65,372	67,534	67,033	65,852	69,050	69,868	77,548	80,414

Source: Anwar Nasution, *Government Decentralization Program in Indonesia* (Asian Development Bank Institute 2016) 4 <https://www.adb.org/publications/government-decentralization-program-indonesia>.

the more general legal framework for regional autonomy established in 1999 and then revised in 2001, 2004, and 2014. We focus, too, on the relative jurisdictions of the tiers of government—national, provincial, city, and county—and consider the mechanisms by which legal conflicts can be resolved. As we demonstrate, the system is inordinately complex, unreliable, and is a significant cause of legal uncertainty in modern Indonesia.[8]

While local governments have generally enthusiastically exercised the power to regulate and otherwise manage their affairs and those of their constituents, the national government had, at least until 2017, retained ultimate *legal* control over them, being able to invalidate regional Perda on various grounds.[9] However, the central government had rarely chosen to exercise this control, unless new regional laws threatened its revenue flows or hampered investment. The Ministry of Home Affairs—the ministry charged with administering regional autonomy—generally failed to review local laws for compliance with national laws, including national human rights norms. In 2017, the Constitutional Court struck down provisions authorizing the ministry to annul these Perda *post-enactment*. As we discuss below, there remains scope for central government review of some types of draft Perda before they are enacted, including those that seek to impose new taxes or regulate regional budgets. However, the central government's only option to remove most types of egregious Perda is now to ask the Supreme Court to review it for consistency with 'higher-level' laws, including national laws. As we explain below, however, this is a highly unpredictable path. The precise scope of the Supreme Court's judicial review powers is unclear[10] and the Supreme Court appears to have been reluctant to convincingly resolve even the disputes over which it clearly has jurisdiction.

The absence of workable review mechanisms has, for the most part, given local governments carte blanche to enact laws on virtually any subject matter without paying regard to national laws—even the Constitution—provided that they do not seek to encroach on central government revenue streams.[11] Of course, this might be a positive development where national laws are lacking (for example, if they fail to provide human rights protections or unduly hamper trade across regional borders) or where local politicians are genuinely concerned with passing laws to further their constituents' interests, such as by making advances in areas such as health, education, and environmental standards. Many

[8] Simon Butt, 'Regional Autonomy and the Proliferation of Perda in Indonesia: An Assessment of Bureaucratic and Judicial Review Mechanisms' (2010) 32(2) *Sydney Law Review* 177.

[9] The only possible exception of which we are aware is provided in Art 235, Law 11 of 2006 on Aceh Regional Government, which appears to permit only the Supreme Court to review Aceh Perda relating to Islamic law.

[10] The scope of the Supreme Court's judicial review jurisdiction is discussed in Chapter 4.

[11] Simon Butt and Nicholas Parsons, 'Reining in Regional Governments? Local Taxes and Investment in Decentralised Indonesia' (2012) 34 *Sydney Law Review* 91.

local lawmakers are indeed well-intentioned and professional. However, many others are incompetent, self-interested, or corrupt, and have produced laws criticized for being predatory, discriminatory, or illegal. This largely unchecked local lawmaking power also results in serious inconsistencies between the laws enacted by the various tiers of government, ultimately leaving legal subjects—the people—unable to distinguish between laws they must follow and laws they can ignore.

LEGAL FRAMEWORK FOR REGIONAL AUTONOMY

The first batch of decentralization laws was enacted in 1999 and came into operation in 2001.[12] The process is commonly described as a 'big bang', with the central and subnational governments having very little time to prepare to relinquish or receive power and responsibility. A key feature of the 1999 framework was devolution of more power to cities and counties than to provinces. As mentioned, one of the main reasons for introducing regional autonomy was to keep Indonesia together, and designers of the new system feared that autonomy might have the opposite effect if granted to provinces, which appeared more feasible as alternative states, at least compared to the smaller city and county units.[13]

The central government retained exclusive power over foreign policy, fiscal and monetary policy, judicial matters, defence and security, and religion: but local governments were given primary responsibility for health, education, infrastructure, transport, land, and environmental matters. For their part, provincial governments were largely confined to mediating disputes between districts, facilitating cross-district development, representing the central government within the province, and helping struggling lower-level governments to perform their functions until they could do this themselves. Provinces were not, therefore, 'naturally' superior to cities.[14] The 1999 Laws were short-lived and had been replaced by 2004. The 2004 Autonomy Law gave provinces more power, making them 'responsible for implementing central government affairs in provinces, counties and cities' (Article 38(1)).

One decade later, the 2004 Law itself was replaced. The 2014 Law consolidates the position of provinces so that they now clearly sit 'above' cities and counties, and exercise some control over them, though the precise extent of that control remains unclear. As discussed below, the 2014 Law granted governors power to invalidate regional regulations issued by city and county governments—but that power has since been removed by the Constitutional Court. It also gives provinces power to enact laws on many matters over which the cities and counties also have jurisdiction. Formally, most provincial laws will trump most city and county laws because they occupy a higher position on the hierarchy of laws but, in practice, ensuring invalidation of inconsistent lower laws is highly problematic.

The 2014 Law clearly seeks to stamp the authority of the national government in general—and the president in particular—over subnational governments. The Law emphasizes that the president holds 'governmental authority' (*kekuasaan pemerintahaan*) (Article 5(1)), which extends across Indonesia. The central government determines policies

[12] See Law 22 of 1999 on Regional Government and Law 25 of 1999 on Fiscal Balance between the Central and Regional Governments. As discussed in Chapter 1, Aceh and Papua achieved 'special' regional autonomy.

[13] Edward Aspinall and Greg Fealy, 'Introduction' in Edward Aspinall and Greg Fealy (eds), *Local Power and Politics in Indonesia: Decentralisation and Democratisation* (Institute of Southeast Asian Studies 2003) 4.

[14] Gabriele Ferrazzi, 'Using the "F" word: Federalism in Indonesia's Decentralization Discourse' (2000) 30 *Publius: The Journal of Federalism* 73; Fitria Fitrani, Bert Hofman, and Kai Kaiser, 'Unity in Diversity? The Creation of New Local Governments in a Decentralising Indonesia' (2005) 41 *Bulletin of Indonesian Economic Studies* 57, 60.

as the basis for 'performing government affairs' (*menyelenggarakan urusan pemerintah*) (Article 6), namely, concurrent affairs falling within the authority of both national and subnational governments. It also 'develops and supervises' the performance of regional governments (Article 7(1)).[15]

The 2014 Law also repeatedly reaffirms central government control over provinces—in particular, governors—and contains expanded provisions on governors as representatives of the central government (Articles 91–93).[16]

RELATIVE JURISDICTIONS

The 2014 Law establishes three categories of government 'affairs' (*urusan*): absolute (*absolut*), over which the central government has exclusive authority; concurrent (*konkuren*), over which authority is divided between the three tiers and authority is handed to the regions 'based on regional autonomy'; and 'general government', over which the president has jurisdiction, as head of the administration (Article 9).

Matters of *absolut* jurisdiction—reserved for the central government—are: foreign affairs, defence, security, justice, national monetary and fiscal issues, and religion (Article 10(1)).[17] The central government can exercise power over these matters itself, or can delegate it to a 'vertical agency' in the region—that is, a local branch of a central government ministry or non-ministerial government agency—or to the governor, as the central government representative (Article 10(2)).

Concurrent affairs fall within the jurisdiction of the national and regional governments and consist of both obligatory and optional affairs (Article 11(1)). Obligatory affairs are further divided into 'affairs related to basic services' and 'affairs not related to basic services' (Article 11(2)). Obligatory affairs related to basic services are: education and health; public works and spatial planning; people's housing and settlements; peace, public order and community protection; and social affairs (Article 12(1)). Regional governments are to prioritize providing these basic services (Article 18(1)), and, when doing so, must follow minimum standards set by the central government (Article 18(2) and (3)). Obligatory affairs not related to basic services are: workforce issues; women's empowerment and child protection; food; land; environment; population administration and the civil registry; community and village empowerment; population control and family planning; transportation; communications and information; cooperatives and small-medium enterprises; capital investment; youth affairs and sport; statistics; culture; cryptography; and libraries and archives (Article 12(2)).

Optional concurrent affairs cover: marine and fishery matters; tourism; farming; forestry; energy and mineral resources; trade; industry and transmigration (Article 12(3)). These appear to be 'optional' in the sense that they will not be relevant for every region. So, for example, regions that are not heavily forested will probably not need to issue laws about forestry and regions with very few tourists might prefer not to regulate tourism.

The precise division of jurisdiction between national, provincial, and city and county governments has long been a vexed issue. For example, the 2004 Law did not clearly distinguish between the obligations of provincial and county/city governments relative to each other. Most of the so-called 'mandatory affairs' for which these tiers were responsible, such as to 'plan, use and monitor spatial planning' and to 'control the natural environment' were

[15] Central government ministries and non-ministries develop and supervise provincial governments (Art 8(1)); and provincial governments develop and supervise county and city governments (Art 8(2)).

[16] Indeed, the very definition of a 'province' is an 'Administrative Region'—that is, 'a working region for governors as the representatives of the Central Government' (Art 4(1)).

[17] Art 10(3), 2004 Regional Government Law granted the central government exclusive authority over the same issues.

identical; others were distinguished only by the scale of those responsibilities, with cities/counties having jurisdiction over their own geographical territories and provinces having jurisdiction over cross-city/county matters.[18] The potential for overlap in the laws issued by various regional governments was, therefore, very high.

The 2014 Law seeks to more clearly delineate the relative jurisdictions of the government tiers. Like the 2004 Law, it allocates jurisdiction over affairs that cross jurisdictional borders. So, for example, the central government has jurisdiction over affairs that cross provincial and national borders (Article 13(2)), provinces have jurisdiction over affairs that cross city and county borders (Article 13(3)), and counties and cities have authority over affairs in their own areas (Article 13(4)).

As for subject matter jurisdiction, the 2014 Law's main text deals only with strategic national interests and affairs that are more efficiently managed by the central government (both of which fall within the central government's jurisdiction) (Article 13(1)). The Law also covers division of authority between the central and subnational governments concerning forestry, marine issues, energy, and mineral resources, depending on the precise issue (Article 14). So, for example, counties and cities manage forest parks (Article 14(2)) and geothermal energy exploitation (Article 14(4)), while the central government manages oil and natural gas (Article 14(3)).

An Appendix (*Lampiran*) to the Law divides up government affairs between the central, provincial, and city/county governments in more detail (Article 15(1)). The Appendix comprises almost 150 pages and outlines relative responsibility over concurrent affairs, including education, health, public works, spatial planning, housing, public order, women's empowerment and child protection, and land and the environment. Issues that are not covered in the Appendix fall within the jurisdiction of 'every level' of government (Article 15(2)), and are to be 'stipulated by presidential regulation' (Article 15(3)).

Article 10(5) of the 2004 Law had provided the central government with power to exercise jurisdiction over affairs falling within the jurisdictions of local governments or to delegate this power to regional apparatuses and officials. This provision appeared to 'defeat the very goal'[19] of decentralization, because it allowed the central government to override or replace subnational laws, or to enact a law that regulated a particular issue, thus leaving little or no scope for local governments to regulate that issue. The 2014 Law appears to contain no direct equivalent to Article 10(5) but, in our view, other provisions in the 2014 Law lead to the same or a similar result. Article 19(1) of the new Law grants the central government power to exercise concurrent jurisdiction but, unlike Article 10(5) of the 2004 Law, specifies this to be only in respect of issues falling within its concurrent jurisdiction as specified in the Law. Though this provision has not, to our knowledge, been judicially tested in Indonesia, it seems not to grant carte blanche to the central government as did Article 10(5).

Importantly, Article 17 grants regional governments power to make policy about matters falling within their jurisdictions (Article 17(1)) but states that they must follow standards, procedures, and norms set out by the central government (Article 17(2)).[20] If a regional policy fails to do this, then the central government can invalidate it (Article 17(3)). These provisions seem to allow the central government largely unbridled legal power to shape subnational government policy. However, the extent to which the central government can really invalidate a 'policy' that is not contained in a legal instrument remains unclear.

[18] See Arts 13 and 14, 2004 Regional Government Law.

[19] Gary F Bell, 'The New Indonesian Laws Relating to Regional Autonomy: Good Intentions, Confusing Laws' (2001) 2 *Asian-Pacific Law & Policy Journal* 29.

[20] Art 16(1) authorizes the central government to set norms and standards for, and to develop and monitor implementation of, all concurrent government affairs.

GOVERNMENT REVIEW OF PERDA

From the outset, the designers of regional autonomy recognized that provincial, county and city lawmakers would need help to draft Perda. After all, these lawmakers had very little skill or experience in formulating policy, let alone drafting laws to give legal effect to it. The 1999 Law therefore required subnational governments to send their Perda to the central government after enactment for 'evaluation'. This practice was retained in the 2004 and 2014 Laws, which require that bills be sent for review within seven days of a local government finishing its deliberations, and the legislature and regional head agreeing to it. City and county governments must send their Perda to their provincial governor for review (Articles 242(4), 249(3) of the 2014 Law); and provincial governments must send their Perda to the Ministry of Home Affairs (Articles 242(3), 249(1)). If they fail to do so, they risk a written reprimand from the minister or the governor (Article 249(2) and (4)). This sanction is weak, giving local governments almost no incentive to comply with the pre-enactment review process. As discussed below, few local governments submit their Perda for review, and this is unlikely to change.

The criteria by which the governor or minister assesses Perda are: conflict with a higher-level law, the public interest, or morality (Article 250(1)). 'Morality' is defined as 'norms related to civilisation and politeness, good behaviour and excellent manners' (Elucidation to Article 250(1)). In our view, it seems near-impossible to assess the legality of a regulation on these 'morality' bases, given that they appear to relate to human behaviour. We presume that, to fall afoul of this ground, a law would need to direct someone to behave in an offensive way to others. 'Public order' is defined to include disrupting inter-communal harmony, access to public services, public peace and order, or economic activity that increases the people's prosperity, and discriminating against an ethnic group, religion, belief, race, group, or gender (Article 250(2)).

The reference to higher-level laws in Article 250(1) appears to be to the hierarchy of laws contained in Article 7(1) of Law 12 of 2011 on Lawmaking, which we discuss in Chapter 2. Although significant doubt about the hierarchy and its operation exists, provincial regulations clearly sit above county and city regulations; and all regional regulations sit below national statutes, government regulations and presidential regulations. As we show in Chapter 2, much uncertainty surrounds the precise operation of the hierarchy, particularly regarding the status of types of laws not included in it. This is an important legal issue in the context of regional autonomy because the Home Affairs Minister often seeks to exercise control over subnational governments by issuing ministerial regulations, which are not included on the hierarchy as a type of law.

According to Article 251(1)–(4), Perda that conflict with a higher law, the public interest or morality can be invalidated by the minister (by ministerial regulation, for provincial laws) or the provincial governor (by gubernatorial decision, for city or county laws). If the governor fails to invalidate a city or county Perda that does not meet these criteria, the minister can invalidate it. If unhappy with invalidation, governors can object to the president (Article 251(7)), and mayors or regents to the minister (Article 251(8)). If no objection is lodged, then the local government has seven days to stop implementing the Perda and to cancel it (Article 251(5)). Regional governments that continue applying an invalidated Perda face administrative sanctions (Article 252(1) and (2)), including withdrawal of central government funding (Article 252(3) and (5)). As we show below, in 2017, the Constitutional Court removed these post-enactment Perda invalidation powers of both the governor and the minister.

Some types of Perda require approval *before* their enactment. These are laws setting local budgets, changes to budgets, spatial plans, taxes and user charges (*retribusi*), and regional development plans. Provincial Perda with this subject matter must be sent to the

minister for pre-approval (Article 245(1) of the 2014 Regional Government Law); and city and county Perda must be sent to the governor before enactment (Article 245(3)). So, for example, once a provincial DPRD and governor agree to a long-term development plan, they must send it to the Minister within three days (Article 267(1)). The reviewer then has fifteen days to assess the plan by reference to its consistency with spatial plans, the public interest, and higher laws (Article 268(1)). If the evaluation is negative, then the local government has seven days to respond by sending an amended version (Article 268(3)). If it does not respond, and in fact enacts the law regardless, then the minister can invalidate that law (Article 268(4)). Similar review processes exist for medium-term plans (Articles 269–71), regional budgets (Articles 314–15), and for tax and user charges laws (Articles 324 and 325), though the Perda produced by city and county governments are assessed by their provincial governor rather than the Minister.

For many years, these Perda review processes have been criticized for lacking effectiveness. Many local governments were notorious for failing to send their Perda for review and for failing to respond to negative reviews.[21] Another significant problem was that the Minister and governors lacked the human resources to review the many thousands of Perda issued each year.[22] Under the 2004 Law, the central government's right of review expired after sixty days (Article 145(3)). If the central government did not invalidate the Perda within this time, then the Perda continued in force by default (Article 145(7)). The result was that many Perda simply 'slipped through', even if their content may have failed to meet the relevant criteria. By contrast, the 2014 Law does not provide for automatic validity after a given period. This led to fears that Perda for review could bottleneck in the offices of the ministry or governors, indefinitely holding back local lawmaking.

Another perceived failure of the Perda review process is that the central government has almost exclusively reviewed and invalidated only Perda that seek to raise revenue.[23] Presumably, this focus helps guard central government revenue flows. Laws with other subject matter appear to have escaped invalidation, perhaps even any form of review, despite some appearing to contradict central government laws or the public interest. The National Women's Rights Commission (*Komnas Perempuan*) has conducted annual reviews of the Perda in force in Indonesia's regions in past years. In mid-2016, the Commission announced that it had identified 421 bylaws that were discriminatory against women and minorities between 2009 and 2016.[24] Discrimination based on gender is prohibited by 'higher laws', namely the 1999 Human Rights Law and the Constitution,[25] yet the central government did not detect these problems, or ignored them, in the review process, and it has not acted on the Commission's reports. Indeed, the central government appears to be nervous, or at least very cautious, about cancelling Perda relating to religion or morality, probably because it fears the response of religious conservatives.[26]

Despite these problems, the central government has, in fact, reviewed and invalidated an increasing number of Perda, albeit, as mentioned, only those relating to revenue. In 2016,

[21] *Panduan Praktis Memahami Perancangan Peraturan Daerah* (Direktorat Jenderal Peraturan Perundang-undangan Departemen Hukum dan HAM bekerjasama dengan United National Development Programme; CAPPLER Project 2008); 'Banyak Perda Abaikan Kaidah Yang Berlaku' *Hukumonline* (16 March 2012).

[22] See David Ray, 'Decentralization, Regulatory Reform, and the Business Climate', in *Decentralization, Regulatory Reform, and the Business Climate* (Partnership for Economic Growth 2003) 18.

[23] Butt and Parsons (n 11).

[24] Muhammad Muhyiddin, 'Komnas Perempuan: Perda Diskriminatif Meningkat' *Tempo.co* (20 January 2014); 'Komnas Perempuan Finds 421 Discriminatory Policies' *Tempo* (19 August 2016) <https://en.tempo.co/read/news/2016/08/19/055797156/Komnas-Perempuan-Finds-421-Discriminatory-Policies>.

[25] See, for example, Arts 1(3), 3(3), Law 39 of 1999 on Human Rights.

[26] Ihsanuddin, 'Mendagri Tegaskan Tak Ada Perda Bernuansa Islam Yang Dibatalkan' *Kompas* (16 June 2016) <http://nasional.kompas.com/read/2016/06/16/14264701/mendagri.tegaskan.tak.ada.perda.bernuansa.islam.yang.dibatalkan>.

for example, the Ministry of Home Affairs announced that it had revoked 3,143 bylaws that conflicted with central government regulations or hampered economic growth.[27]

In two decisions issued in 2017, the Constitutional Court invalidated provisions in the 2014 Law, discussed above, under which provincial governors and the central government had been able to review and invalidate Perda after their enactment. The first case was brought by over forty county governments and the Indonesian Association of County Governments.[28] They disputed various provisions in the 2014 Law, including the subsections in Article 251 that allowed governors to invalidate city and county laws that breached higher-level laws, the public interest, or morality. These provisions, they claimed, were unconstitutional for two reasons. The first was that they violated the rights of subnational governments granted by Article 18 of the Constitution. The second was that bureaucratic review usurped the judicial function of the Supreme Court.

A majority of the Court accepted this second argument, equating the function of governors and the minister with 'judicial review' which, under the Constitution, could only be performed by the Supreme Court. The Constitutional Court added that gubernatorial decisions lacked sufficient authority to invalidate city or county Perda for two related reasons: first, these decisions did not appear in the hierarchy of laws, while Perda do; and, second, an administrative *decision* could not prevail over a *regulatory* instrument in any event.[29] This usurpation of the judicial function, and the appearance of Perda but not 'decisions' on the hierarchy, led the Court to conclude that the impugned provisions violated the rule of law (*negara hukum*). A minority disagreed, arguing that the president, as head of the government administration, was responsible for exercising government authority and, therefore, could review and invalidate Perda.

A few months later, the Court handed down a decision of similar effect but this time concerning provincial Perda.[30] The Court applied its reasoning in the earlier case to invalidate provisions of the 2014 Law that allowed the minister to invalidate provincial Perda by ministerial decree. Now that post-enactment bureaucratic review mechanisms are no longer available, only two alternatives for Perda invalidation remain: enactment of a higher-level law to revoke the Perda or judicial review proceedings in the Supreme Court. It is to this role of the Supreme Court in central–local jurisdictional disputes to which we now turn.

JUDICIAL REVIEW OF PERDA

Prior to the 2014 Law, the Supreme Court could resolve disputes between tiers of government about the validity of Perda through two mechanisms. The first was under its general judicial review powers, which we discuss in more detail in Chapter 4. As mentioned there, Article 24A(1) of the Constitution grants the Supreme Court power to review legal instruments below the level of a statute to ensure that they comply with statutes. This jurisdiction is confirmed both in Law 4 of 2004 on the Judiciary (Article 11(2)(b)) and Law 14 of

[27] Ayomi Amindoni, 'Government Annuls 3,143 Bylaws' *Jakarta Post* (13 June 2016) <http://www.thejakartapost.com/news/2016/06/13/government-annuls-3143-bylaws.html>.

[28] 137/PUU-XIII/2015.

[29] This relates to the highly fraught debate about the difference between regulations and administrative decisions, which we discuss in Chapter 2. On the one hand, administrative courts can review (and invalidate) administrative 'decisions' but not 'regulations'. On the other hand, the Supreme Court can only engage in judicial review of regulations, not decisions. (Confusingly, the Supreme Court can hear appeals against administrative court decisions about the validity of administrative decisions but these cases do not involve the invocation of its judicial review powers.) Lawyers and judges alike find distinguishing between decisions and regulations very difficult, and indeed, many regulations that apply generally as 'law' are disguised as 'decisions': Simon Butt and Nicholas Parsons, 'Judicial Review and the Supreme Court in Indonesia: A New Space for Law?' (2014) 97 *Indonesia* 55–85.

[30] 56/PUU-XIV/2016.

1985 on the Supreme Court (Article 31(1)).[31] These Laws authorize the Supreme Court to invalidate a legal instrument below the level of statute if a) it conflicts with a higher legislative instrument; or b) the process by which it was enacted did not conform to legislative requirements.[32] Legal instruments invalidated by the Supreme Court will no longer be legally binding.[33]

The second was a narrower judicial 'review' power, granted under the 2004 Regional Government Law. Article 145(5) had allowed local lawmakers whose laws were revoked by the central government (under the executive review process, discussed earlier) to challenge the revocation, presumably because the grounds for the revocation did not exist when the revocation was made. However, the 2014 Law contains no such mechanism[34] and, in light of the Constitutional Court decisions mentioned above, which removed these revocation powers, this narrow judicial review avenue is redundant in any event.

The general judicial review mechanism remains available. However, formally, it appears to be of limited benefit for resolving the jurisdictional disputes between tiers of government that occur in the context of regional autonomy. This is because, as mentioned, the general review mechanism formally restricts the Supreme Court to assessing whether lower-level laws comply with statutes. In other words, the Supreme Court can only assess whether a Perda is valid by reference to a statute. Its review jurisdiction does not formally extend to most of the possible conflicts or disputes that arise from the hierarchy of laws, including between a lower-level law and another lower-level law on the hierarchy. So, there are no legal mechanisms formally available for the review of Perda against ministerial decrees. Also missing is a mechanism for the review of country/city Perda as against provincial Perda, even though the hierarchy lists provincial Perda above country/city Perda. Finally, there are no avenues to resolve conflicts between legislation from different subnational governments of the same level. Such a conflict might occur, for example, if contradictory Perda from neighbouring provinces purport to regulate trade between those two provinces, or the management or use of natural resources that cross provincial borders.

Following these constitutional and statutory restraints, the Court has, in many cases, rejected applications for the review of lower-level laws as against other lower-level laws because it only has jurisdiction to review lower-level laws as against statutes.[35] However, the Court has not always considered itself strictly bound by the constitutional and statutory limitations imposed on the exercise of its judicial review jurisdiction. Successive regulations issued since 1993 by the Supreme Court Chief Justice governing judicial review procedures appear, in fact, to have ignored them. The regulations declare that Supreme Court judicial review applications can be brought 'against a legal instrument suspected of being inconsistent with a higher-level legal instrument'.[36] In other words, the Chief Justice's regulations allow applicants to challenge a lower-level law against a higher-level law, even if that higher-level law is not a statute. The Court has, in fact, struck down Perda for conflicting with government regulations and presidential regulations in several cases.[37] The result is uncertainty about a fundamental issue: whether the Supreme Court will, in any given case, refuse to hear disputes about conflicting lower-level laws or whether it will decide them in apparent contravention of both the Constitution and statute.

[31] Law 14 of 1985 on the Supreme Court has been amended twice, first by Law 5 of 2004 Amending Law 14 of 1985 on the Supreme Court, and second by Law 3 of 2009 Amending for the Second Time Law 14 of 1985 on the Supreme Court.

[32] Art 31(2), Law 14 of 1985. [33] Art 31(4), Law 14 of 1985.

[34] Given that Art 409, 2014 Law revoked the 2004 Law in its entirety, this avenue appears to be closed.

[35] See, for example, Supreme Court Decision 19/P/HUM/2002.

[36] Art 2(2), Supreme Court Regulations 1 of 2004 and 2011; Art 3(1), Supreme Court Regulation 1 of 1993.

[37] See, for example, Supreme Court Decisions 01/P/HUM/2001, 20P/HUM/2002, and 25/P/HUM/2008.

Even those conflicts that fall within the Supreme Court's judicial review jurisdiction have rarely been resolved convincingly. Generally speaking, the Supreme Court's reasoning in judicial review cases is simplistic and superficial. In many Perda review cases, the Court has not, in its judgments, discussed the substance of the relevant bylaw, the arguments of the parties, or even whether the bylaw contradicts any higher laws.[38] In other words, the Court has been reluctant to openly consider the 'merits' of the case. The Court has, in some cases, been content to simply declare that the Perda is regional in scope and within the jurisdiction of the local government 'on the basis of Regional Autonomy'.[39] In the eyes of the Supreme Court, it seems that regional governments should, and do, have a broad discretion to pass laws to implement a wide range of policies.

Finally, as discussed in Chapter 2, fundamental questions remain unanswered in both the Court's decisions and in the Indonesian legal literature about the degree to which laws must overlap to be 'inconsistent'. Are laws 'inconsistent' simply if they cover the same subject matter as each other, even if they are quite different in their details? The Supreme Court appears to have answered this question in the affirmative in some cases, invalidating Perda for regulating an issue that had been touched upon in a presidential decision, even though the Perda and the presidential decision did not appear to directly contradict each other.[40]

Another important unresolved question is whether a lower-level law should be deemed inconsistent with a higher-level law if it simply adds requirements or preconditions that do not appear in the higher-level law. One view is that additions are both expected and necessary when higher-level laws are cast in general terms, leaving detail to be fleshed out by local government, as recognition that they are best placed to 'fit' rules to local conditions.

THE FUTURE

Clearly, regional autonomy has posed significant challenges to Indonesia's legal system, most of which it has failed. The result of granting wide lawmaking powers to subnational governments was a proliferation of lower-level laws, which many commentators have criticized. Perhaps the primary concern has been that many of these laws, particularly in the earlier days of decentralization, exacted taxes and user charges, some of which duplicated those imposed by another tier of government, without providing commensurate services.[41] This, as the Indonesian Chamber of Industry (*Kamar Dagang dan Industri Indonesia*, KADIN) and many other commentators have long argued, created a 'high cost economy' that has damaged Indonesia's investment climate.[42] Various non-governmental organizations (NGOs) also identified hundreds of oppressive or discriminatory bylaws in operation across Indonesia. Worse, it had also become clear that many local officials had been using their office for private commercial gain rather than to improve public services

[38] See, for example, Supreme Court Decisions 03/G/HUM/2002, 06/P/HUM/2003, and 06/P/HUM/2006.

[39] See, for example, Supreme Court Decision 03/G/HUM/2002.

[40] Supreme Court Decisions 20P/HUM/2002; 25/P/HUM/2008.

[41] In the first six years of decentralization alone, local governments established, between them, around one thousand new taxes and user charges (*retribusi*) every year. See Blane D Lewis and Bambang Suharnoko Sjahir, 'Local Tax Effects on the Business Climate' in Neil McCulloch (ed), *Rural Investment Climate in Indonesia* (SEAS 2009) 224, 231.

[42] Pratikno, 'Exercising Freedom: Local Autonomy and Democracy in Indonesia, 1999–2001' in Priyambudi Sulistiyanto, Maribeth Erb, and Caroline Faucher (eds), *Regionalism in Post-Suharto Indonesia* (RoutledgeCurzon 2005) 21; Ilyas Saad, 'Implementasi Otonomi Daerah Sudah Mengarah Pada Penciptaan Distorsi dan High Cost Economy', in *Decentralization, Regulatory Reform, and the Business Climate* (Partnership for Economic Growth 2003); Agus Maryono, 'Thousands of Bylaws Halt Investment: BKPM' *Jakarta Post* (23 October 2009); OECD, *OECD Investment Policy Reviews* (Organisation for Economic Co-operation and Development 2010) 21.

for their constituents.[43] Some Perda are said to be unworkably unclear, meet no apparent regulatory need and are not preceded by any public consultation.[44] As this chapter has shown, the shortcomings of bureaucratic review and judicial review mean that most of these laws remain on the books, regardless of their flaws. Unfortunately, this means that the legal uncertainty they bring also remains.

[43] Pratikno (n 42); Vedi R Hadiz, 'Decentralization and Democracy in Indonesia: A Critique of Neo-Institutionlist Perspectives' (2004) 35 *Development and Change* 697; Vedi Hadiz and Richard Robison, 'Neo-Liberal Reforms and Illiberal Consolidations: The Indonesian Paradox' (2005) 41 *The Journal of Development Studies* 220. These claims seem to be borne out by Corruption Eradication Commission (*Komisi Pemberantasan Korupsi*, KPK) investigation and prosecution statistics. In 2016, the KPK announced that it had declared at least ten sitting governors, regents, or mayors to be suspects in corruption cases in 2016. According to the KPK, eighteen former or serving governors and 343 regents and mayors have been involved in corruption cases: Abba Gabrillin, 'Kaleidoskop 2016: 10 Kepala Daerah Tersangka Korupsi' *Kompas* (3 August 2016) <http://nasional.kompas.com/read/2016/12/12/09232571/kaleidoskop.2016.10.kepala.daerah.tersangka.korupsi.?page=all>; Abba Gabrillin, 'KPK: 18 Gubernur dan 343 Bupati/Wali Kota Terjerat Korupsi' *Kompas* (12 December 2016) <http://nasional.kompas.com/read/2016/12/12/09232571/kaleidoskop.2016.10.kepala.daerah.tersangka.korupsi.?page=all>.

[44] Ray (n 22).

4

The Judicial System

INTRODUCTION

In this chapter, we discuss the Indonesian judicial system, covering all courts except the Constitutional Court, which is the focus of the next chapter.

Indonesia is a former Dutch colony. Upon declaring Independence in 1945, the new republic inherited the Dutch legal system, including Dutch colonial law as it then stood.[1] Most Dutch laws have since been replaced but some Dutch colonial statutes have survived. Perhaps the most significant of these are the Civil Code (discussed in Chapter 10), which was passed in 1838 in Holland and brought into force in Indonesia largely unamended in 1848, and the Criminal Code (discussed in Chapter 10), which is based on the Dutch Code first brought into force into Indonesia in 1918.

From the Dutch Indonesia also inherited the 'civil law' or 'continental law' legal tradition—found in European countries, such as France and Germany, and much of Asia and South America.

JUDICIAL DECISION-MAKING

One feature of most civil law systems is the absence of a formal system of precedent. In these systems, judicial decisions are, therefore, generally not considered a formal source of law. Judges are usually not required to follow the prior decisions of judges in courts higher than their own, or of the same level. However, in practice, most civil law countries have something resembling an informal and non-binding system of precedent. Indonesia is no exception, although the issue is still subject to much debate and uncertainty. Indonesian first instance and appeal courts generally consider selected, prominent decisions of the Supreme Court (called *yurisprudensi* or jurisprudence) to be highly persuasive. Lower court judges are therefore usually reluctant to depart from a line of consistent Supreme Court decisions on a particular point of law or interpretation, particularly if the Supreme Court has stated that a particular decision should generally be followed, as it sometimes does in practice notes known as 'circular letters' (*surat edaran*).

However, opinions differ in Indonesia about whether judges *must* follow previous decisions and, relatedly, whether *yurisprudensi* is a formal source of law. One the one hand, some Indonesian scholars continue to emphasize that civil law judges follow the 'principle of freedom' (*asas bebas*) rather than the 'principle of precedent' (*asas precedent*) adhered to in common law systems, which developed in the United Kingdom and applied in its former colonies.[2] Formally, then, decisions bind only the parties involved in the case.[3] According to influential scholars such as Utrecht, if judges created law that applied

[1] Arts I and II of the Transitional Provisions of the 1945 Constitution, stated that all existing institutions and regulations in place at the time of independence would continue to be valid, pending the enactment of new institutions and regulations in conformity with the Constitution.

[2] Hardjito Notopuro, *Tentang dan Sekitar Dokumentasi Hukum-Yurisprudensi, Law Report: Ikhtisar Singkat* (Binacipta 1987) 14; Purnadi Purbacaraka and Soerjono Soekanto, *Perundang-undangan dan Yurisprudensi* (Alumni 1979) 44.

[3] Sudarsono, *Pengantar Ilmu Hukum* (Rineka Cipta 2001) 87; Mohamad Isnaini, *Hakim dan undang-undang* (Ikatan Hakim Indonesia 1971) 13.

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generally in their decisions, they would usurp the role of the legislature.[4] Some of these scholars also argue that judicial independence does not require merely freedom from government interference—it also requires that judges are not influenced by the decisions of other judges, even the prior decisions of the most senior judges.[5] As Dedi Soemardi explains,

> a judge of the Bandung PN [city or county district court] need not feel bound to follow the decisions of the Semarang PN on a particular matter, and is not even required to follow the West Java PT [provincial high court]. The West Java PT is not bound by the decisions of the Greater Jakarta PT on a particular case and even not bound by prior decisions of the Supreme Court in similar cases.[6]

On the other hand, many Indonesian commentators argue that *yurisprudensi* has now achieved precisely this status as binding authority, at least in practice. For example, the late former Supreme Court judge and legal scholar Professor Paulus Effendi Lotolung has contended that, in practice, adherence to *yurisprudensi* is so strong in Indonesia that its legal system now resembles the common law system.[7] To many Indonesian judges this conclusion might seem extreme but it is supported by Supreme Court Circular Letter 2 of 1972, which states that Supreme Court compilations of *yurisprudensi* 'must be followed by judges when deciding cases'.

Applying *yurisprudensi*

Even if it is accepted that Supreme Court jurisprudence should be followed, doing so has traditionally been difficult, for two reasons. First, prior judicial decisions have, until recently, been hard to obtain, even for judges. Indonesia has never had a routinely produced series of authorized reports of Supreme Court decisions. For several decades after Independence, some important decisions were collected and published by the Supreme Court in a compilation entitled *Yurisprudensi Indonesia* (Indonesian Jurisprudence). Although the series was intended to be published annually, years would often pass between editions. In any event, only a fraction of the Supreme Court's decisions were published in this series and the decisions included were selected on an ad hoc—sometimes seemingly random—basis.[8] Some practitioners produced compilations of decisions in cases they handled[9] but these contained only a miniscule proportion of decided cases, and their authority was questionable at best.

However, since the early 2000s, the number of judicial decisions made available has increased exponentially. This is because a few enterprising non-governmental organizations (NGOs), assisted by practitioners, began collecting important decisions and publishing them online. Instrumental in this was 'Hukumonline' (<http://www.hukumonline.com>), which continues to provide Indonesia's leading legal database and most reliable legal news service. In recent years, some courts in Indonesia have begun publishing their decisions on their own websites. This was pioneered by the Constitutional Court (*Mahkamah Konstitusi*)—which, from its establishment in 2003, posted its decisions almost immediately after reading them in open court. The religious courts (*Pengadilan Agama*) were

[4] E Utrecht and Moh Saleh Djindang, *Pengantar dalam Hukum Indonesia* (Sinar Harapan; Ichtiar Baru 1983) 204.

[5] BPHN, *Laporan Penelitian tentang Peningkatan Yurisprudensi sebagai Sumber Hukum* (Badan Pembinaan Hukum Nasional, Departemen Kehakiman 1993) 21.

[6] Dedi Soemardi, *Sumber-Sumber Hukum Positip* (Alumni 1980) 44.

[7] Paulus Effendie Lotulung, *Peranan Yurisprudensi Sebagai Sumber Hukum* (Badan Pembinaan Hukum Nasional, Departemen Kehakiman 1997) 12.

[8] Sebastiaan Pompe, *The Indonesian Supreme Court: A Study of Institutional Collapse* (Southeast Asia Program, Cornell University 2005).

[9] See, for example, Sudargo Gautama, *Himpunan Jurisprudensi Indonesia Yang Penting Untuk Praktek Sehari-Hari (Landmark Decision), Berikut Komentar* (Citra Aditya Bakti 1992).

Table 4.1 *Supreme Court cases online (2007–16)* *

Year	Cases decided	Uploaded	% of cases uploaded
2007	10714	1122	10%
2008	13885	5246	38%
2009	11985	6411	53%
2010	13891	5747	41%
2011	13719	11873	87%
2012	10995	8372	76%
2013	16034	9239	58%
2014	14501	9338	64%
2015	14452	10747	74%
2016	16223	14689	91%

* Data for cases decided taken from Mahakamah Agung, *Laporan Tahunan* 2016 (Mahkamah Agung 2017) 78. Upload data taken from <http://putusan.mahkamahagung.go.id/pengadilan/mahkamah-agung/periode/putus> (27 July 2017). These figures should be taken as indicative only—the decisions posted in any one year are not necessarily decisions decided in that year.

also leaders, providing many of their decisions for uploading to the Australasian Legal Information Institute website.[10] The religious courts began doing this after the Constitutional Court but years before any other court began routinely publishing decisions.

The Supreme Court felt shamed by the initiative of these courts—particularly the religious courts, which it supervises. From 2007, it began to publish many of its own decisions and those of many of the courts it administers on its website (putusan.mahkamahagung.go.id).[11] It has since uploaded a remarkably large number of judgments. According to the Supreme Court's 2016 Annual Report, 438,989 decisions were posted in 2016 alone,[12] slightly down from the 464,204 decisions added in 2015.[13] As of December 2016, the Court had provided online more than 2,061,000 decisions which, the Court claims, is much more than the number of decisions made available online by any other court in the world.

Although this is undoubtedly exceptional progress, publication is, incredibly, far from complete. Each year, the Supreme Court alone consistently decides between 10,000 and 16,000 cases, and does not upload all of them (see Table 4.1). Together, Indonesia's first instance and appeal courts decide between three and four million cases annually.[14] The decisions appearing on the Supreme Court website constitute only a small fraction of the decided cases of Indonesia's courts.

Significant problems remain, however. For example, judgments from courts other than the Constitutional Court are generally not released immediately after they are made, if they are provided at all. Some reformers harbour fears that the Supreme Court is selective about the cases it makes publicly available. Indeed, some more controversial decisions—about which there is significant negative publicity and public reaction—have never appeared online, or have only appeared many months after being decided.[15] There is even some

[10] <http://www.austlii.org>.

[11] The Supreme Court is required to provide public access to its decisions (Art 32B, Law 14 of 1985 as amended in 2009).

[12] Mahkamah Agung, *Laporan Tahunan 2016* (Mahkamah Agung 2017) 16.

[13] Mahkamah Agung, *Laporan Tahunan 2015* (Mahkamah Agung 2016) 14.

[14] Mahkamah Agung, *Laporan Tahunan 2016* (Mahkamah Agung 2017) 85.

[15] For example, a 2007 Supreme Court decision (16/HUM/2006) upholding the legality of a controversial 2005 regional regulation of the Tangerang city government banning suspected prostitution has, to our knowledge, never been published by the Court. This regulation gained notoriety when it was used to prosecute a

doubt about whether the online version of a decision is 'official'—that is, a formal legal document.[16]

Also problematic is the utility of the judicial decisions that *are* available. Like the decisions of courts in many civil law countries, most Indonesian judicial decisions are not particularly instructive or even self-contained. In Indonesia, many, if not most, are also unlikely to contain sufficient information to enable another court to follow them. While the formal document containing the decision might run from five to 200 pages or more, the judgment itself is usually only one or two pages, sometimes only two or three short paragraphs. As explained below, the reasoning contained in the judgment is often scant and fails to clearly outline the relevant law or how the court applied it. The legal interpretation process and competing arguments are rarely disclosed, let alone discussed in any detail. The bulk of each decision usually comprises formalities such as the parties' identities and legal arguments, the procedural history, and a list of evidence.

Worse, some Indonesian lawyers complain that the quality of more recent Supreme Court jurisprudence has been declining, compared even with the 1960s, 1970s, and 1980s, when the Indonesian judiciary was subservient to government.[17] This might explain why many Supreme Court judgments, and even modern Indonesian legal textbooks, appear to rely heavily on decades-old 'precedents', despite their being arguably very distant from modern legal needs.

Although to our knowledge no one has convincingly explained this claimed decline in quality, it seems consistent with at least two factors. First, as we discuss below, the Supreme Court's workload increased significantly when administrative, organizational, and financial responsibility for the courts was transferred to it from the government in 2004. At the time of the transfer, the Court could not competently administer itself, much less the 45,000 officials, 10,000 court staff, and several hundred courts spread across Indonesia for which it became responsible.[18] These additional administrative incumbrances undoubtedly distracted the Court from its primary adjudicative functions for some years, and some claim that precipitated a decline in its legal reasoning.[19]

Second, the Supreme Court has, for many years, had a relatively high case backlog. For example, in 2004, the Court had more than 20,000 pending cases. One of the Court's priorities has been to reduce this backlog. This, it has done successfully. In 2016, it reported having a backlog of only 2,357 cases.[20] We suspect, however, that clearing the backlog led to a huge increase in the judicial workload for the forty to fifty judges of the Supreme Court. This may have pressured judges into deciding cases quickly, giving them insufficient time to produce good-quality judgments.

Structure of decisions

Indonesian court decisions all closely follow a similar, highly formulaic pattern.[21] The opening phrase, 'In the Name of Justice Based on Almighty God', is required by statute.[22] The court next recites the names of the parties, their age, religion, occupation, address, and

woman, Lilis Lindawati, who claimed she was waiting to be picked up by her husband after work. See Tim Lindsey *Islam, Law and Society in Southeast Asia: Volume 1 Indonesia* (IB Tauris 2012) 376–77.

[16] For example, every recent Constitutional Court decision obtained from the Constitutional Court's website states, in a footer appearing on each page, that to obtain an 'official copy' one should contact the Court's registrar.

[17] 'Banyak Putusan Kasus Korupsi di MA Tanpa Pertimbangan Jelas' *Hukumonline* (27 August 2010).

[18] By virtue of Presidential Decision 21 of 2004: Lindsey (n 15) 274–75.

[19] S Butt and Tim Lindsey, 'Judicial Mafia: The Courts and State Illegality in Indonesia' in G Van Klinken and Edward Aspinall (eds), *The State and Illegality in Indonesia* (KITLV Press 2010).

[20] Mahkamah Agung (n 12) 17.

[21] This section draws on Lindsey (n 15) 330–33.

[22] *Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa*: Art 4(1), Law 4 of 2004 on Judicial Power.

their role as applicant/respondent, plaintiff/defendant or appellant/respondent.[23] The court then declares it has read the relevant documents, heard the submissions of both parties, and examined any witnesses or evidence provided.

In the next section, entitled *Tentang Duduk Perkara* (Regarding the Position of the Case), the court summarizes the submissions, counter-submissions, rebuttals, and replies of both parties, including any documentary evidence or witness testimony. Each paragraph generally begins with *bahwa* ('whereas' or 'noting that') and ends in a semicolon, to create a single, elongated sentence that can sometimes run for many pages. This is typically the lengthiest section of most judicial decisions, as the court generally includes all submissions and allegations made by the parties, even if the court ultimately does not consider them or finds them to be irrelevant or unsubstantiated. In appeal cases, this section is typically reproduced to give the case history, including submissions made by each party at each stage of the judicial process and the orders of each court that has heard the case.

The court provides its findings of fact and reasoning in the section entitled *Tentang Pertimbangan Hukum* (Regarding Legal Considerations) or *Tentang Hukumnya* (Regarding the Law). In this section, most paragraphs begin with *Menimbang bahwa* ('Considering that … ') and are followed by the material facts or legal principles on which the court relies to reach its conclusion. The court will not usually put forward any alternative interpretation of the law applied, instead simply briefly stating relevant principles as if they are self-evident.[24] In fact, except for judgments of the Constitutional Court (discussed below), Indonesian judgments rarely include any detailed legal reasoning. The language used is that of assertion rather than argument and it is very unusual for the court to express doubt, or even opinions, regarding witness testimony or other evidence. A claim by one party will often simply be deemed to have been made out unless it is denied or disputed by the other party. If the claim is disputed, the party asserting it will usually be required to produce evidence to support it, failing which the assertion will be rejected. If evidence is produced, whether in documentary form or witness testimony, the party disputing the assertion will then be required to produce evidence to substantiate their own position. The emphasis sometimes appears to be on the quantity, rather than quality, of evidence.

Under the penultimate heading of the decision, *Mengingat* ('Remembering'), the court lists the main statutes and laws from which it acquires jurisdiction and on which it relies to decide the case. However, courts sometimes take shortcuts, simply reciting the formula 'all laws that are valid and relevant to this case', without listing the primary legislative instruments relied on. This is a convenient way for the court to pre-empt criticism that it did not consider a relevant law when deciding the case. It is common for the court to identify some relevant laws here but not the relevant provisions of those laws.

Finally, the court gives its orders (*Amar Putusan*) under the heading *Mengadili* ('Decides'). Technical rules and conventions apply to this section and its wording is often altered on appeal, even if the substance of the orders is not altered.

Doctrine

The lack of court-led jurisprudence, and relatively uninformative judicial writing styles, might not be unusual for a country adhering to the civil law tradition. In many civil law countries, such as France, judicial decisions are, however, complemented by a rich body of

[23] In religious courts and high religious courts, the opening phrase is itself preceded by the traditional Arabic invocation *Bismillahirrahmanirrahim* (In the name of God the Merciful, the Giver of Mercy): Art 57(2), Law 7 of 1989 on Religious Courts.

[24] This seems to be a feature of some courts following the civil law tradition, including the French Cour de Cassation: Mitchel Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press 2004).

academic literature, or 'doctrine', which is usually contained in academic texts. Doctrine often draws out general principles, provides frameworks to approach legal problems, and maps the trajectory of judicial developments of bodies of law and the judicial interpretation of statutes. This literature is often read by judges and lawyers alike, and is said to influence court decisions far more than academic works in common law countries, particularly if written by well-respected scholars. Indeed, some argue that in the civil law tradition, judicial decision and doctrine combined provide roughly the same 'information' as the judicial decision alone in common law countries.[25]

Doctrine in Indonesia is notoriously undeveloped for most areas of law. An increasing number of impressive legal academics have emerged in the post-Soeharto period, particularly at Indonesia's premier law schools, such as the University of Indonesia and Gadjah Mada University. However, as Bell explains, many of these academics are overworked and underpaid, taking positions in several universities and working in private practice to make ends meet.[26] As a result, they have not been able to produce a significant body of high-quality Indonesian doctrine in any area of law.

Using the Civil Code (*Burgerlijk Wetboek voor Indonesië* or *Kitab Undang-Undang Hukum Perdata*, KUHPerdata) as an example, Bell explains that Indonesian lawyers are forced to look outside Indonesia for explanation of Code provisions.[27] However, this is usually problematic. For guidance with the Indonesian Civil Code—a translation of the Dutch Code, now more than 150 years old—Indonesians cannot turn to current Dutch doctrine, because the Dutch Code (upon which the Indonesian Code is based) has now been replaced and, in any event, most Indonesian lawyers cannot speak Dutch. A potential source of information is the doctrine surrounding the French Civil Code, much of which remains identical to the Indonesian Civil Code, but most Indonesian lawyers cannot speak French. Some Indonesian lawyers and judges therefore resort to Dutch writings on the Civil Code dating from colonial times, when the Civil Code was still in force in Holland. The result, of course, is reliance on antiquated views that are often inapplicable to modern day legal problems. (We discuss the Civil Code in more detail in Chapter 15.)

The absence of Indonesian doctrine deprives the system of a source of information considered in many civil law systems to be crucial to the operation and predictability of law.[28] This is, of course, not a problem that can be solved easily or quickly; developing doctrine will be a slow process that requires providing the academic community with incentives to produce more higher quality research.

Statutory interpretation

No formal guidelines on statutory or legal interpretation exist in either written law or *yurisprudensi*.[29] According to doctrine on statutory interpretation followed in many civil law countries, including Indonesia, when they come to apply a written law, judges should begin by looking at its text, including its elucidation, or explanatory memorandum.[30] This so-called 'grammatical method' requires judges to determine the meaning of words used in the law by considering the everyday meaning attributed to those words. Dictionaries or language experts can be used in this endeavour.

[25] Mitchel Lasser, 'Judicial (Self-)Portraits: Judicial Discourse in the French Legal System' (1995) 104 *Yale Law Journal* 1325.

[26] Gary Bell, 'The Importance of Private Law Doctrine in Indonesia' in Tim Lindsey (ed), *Indonesia: Law and Society* (2nd edn, Federation Press 2008).

[27] ibid. [28] Lasser (n 25).

[29] M Sudikno Mertokusumo, *Bab-bab tentang Penemuan Hukum* (Citra Aditya Bakti 1993) 20.

[30] Utrecht and Moh Saleh Djindang (n 4) 208.

If the grammatical interpretation does not resolve uncertainty about the meaning of the law or whether it applies to the case before them, then according to doctrine produced by Indonesian legal scholars, judges should attempt to determine the intent of the lawmaker.[31] This is often called the 'historical approach'.[32] The starting place here is often, again, the elucidation but judges also regularly consider the legislative debates surrounding the law's enactment, and other general background materials.

In addition, judges can interpret unclear laws by engaging in an 'internal' analysis of them, or by viewing them in the context of provisions in other laws. This is 'systematic interpretation'. Using this approach, judges might derive a legal principle from a set of related sections of the legislation being interpreted or make assumptions from the structure of the law to assist them in interpreting a particular provision.[33]

Legal scholars also refer to the 'sociological' or 'teleological approach' as an appropriate interpretative method, particularly if the law in question is out-of-date and applying it will cause injustice or an otherwise inappropriate result. Using this method, judges can enter the field of sociology to 'provide a new social purpose which accords with current social reality' for the law they apply.[34] Several Indonesian scholars point to cases in which Indonesian judges have used this method to apply provisions of the Criminal Code to handle electricity theft, even though the theft provisions of the Code only refer to theft of tangible goods (*barang*).[35]

Most scholars also refer to 'expansive' and 'restrictive' interpretation. Using these techniques, judges can, as they see fit, expand or restrict the ambit of legal provisions to either bring a set of facts in a case before them within the scope of the law, or to prevent the application of the law to facts that might otherwise seem to apply to the law.[36] Judges who employ restrictive interpretation techniques might create exceptions to broad statements of legal principle contained in written laws. So, for example, judges have prevented litigants who have brought a claim under Article 1365 of Indonesia's Civil Code (as discussed in Chapter 15, this provides general civil liability for damage caused by an intentional act) from claiming compensation for the entirety of the damage suffered if they contributed to that damage.[37]

Judges in many civil law countries, including Indonesia, also have at their disposal several methods to fill 'gaps' in the law. One such gap-filling method employs analogy. This involves extending the application of a provision of a law by construing it as a general rule applicable to situations that would fall outside the ambit of that law, if strictly interpreted.[38] A famous Indonesian example of gap-filling by analogy derives from Bismar Siregar, a well-known former Supreme Court judge. In the 1980s, he argued that males who convinced females to have sexual intercourse through false promises of marriage could be convicted under Article 378 of the Criminal Code dealing with theft by deception, because the male had 'stolen' the honour of the female under false pretences. This reasoning was followed for some time but was rejected by the Supreme Court in 1990, which held that honour is not an object for the purposes of these Criminal Code provisions.[39]

'A contrario' interpretation is another gap-filling technique. Put simply, if analogy allows similar facts to be treated the same, then an a contrario interpretation holds that facts

[31] ibid.
[32] CST Kansil, *Pengantar Ilmu Hukum dan Tata Hukum Indonesia* (Balai Pustaka 1979) 65.
[33] Utrecht and Moh Saleh Djindang (n 4) 208; Mertokusumo (n 29) 16.
[34] Utrecht and Moh Saleh Djindang (n 4) 217.
[35] Purbacaraka and Soekanto (n 2) 59; Mertokusumo (n 29) 16.
[36] A Ridwan Halim, *Pokok-Pokok Peradilan Umum di Indonesia dalam Tanya Jawab* (Pradnya Paramita 1987) 84.
[37] Kansil (n 32) 66.
[38] Lie Hock, *Jurisprudensi Sebagai Sumber Hukum* (Penerbitan Universitas 1959) 16.
[39] S Pompe, 'Between Crime and Custom: Extra-Marital Sex in Modern Indonesian Law' in Tim Lindsey (ed), *Law and Society in Indonesia* (1st edn, Federation Press 1999) 117.

which are not the same are not treated the same. According to the a contrario method, if a law covers a particular situation, then it cannot apply to situations not covered by the law.[40] Article 1320 of the Civil Code, which sets out the four features of a valid contract, is cited as an example of this approach by various Indonesian scholars.[41] Using the a contrario technique, a judge could conclude that if one of the four requirements had not been met, then a contract would not have been formed.

Judicial career path

Most of Indonesia's 7,500 or so[42] judges are 'career judges'—that is, they spend their entire careers as judges. Like judges in many other civil law countries, they are recruited soon after completing law school. After several months' training and an internship, they begin working as a judge. They largely follow an established career progression system, beginning in a small first instance court, usually in a remote part of Indonesia, where the cases they handle tend not to be complex. They then make their way up the judicial hierarchy, working in several different courts throughout the country. Judges can generally expect to be transferred and/or promoted every three to five years to a better position in the same or similar class of court, or to a court in a larger urban centre that handles more complex cases. As their careers progress, many judges will be promoted as *hakim ketua* or chief judge (chair) or deputy chief judge of a district court, and then be promoted to a provincial high court (Indonesia's judicial hierarchy is discussed below). Only a select few will ever be appointed to the Supreme Court, which, at time of writing, had forty-eight judges.[43] The Supreme Court Law caps the total number of Supreme Court judges at sixty.[44]

Before 2009, Indonesian judges were civil servants[45] and before 2004 most courts were formally under the organizational, financial, and administrative control of government departments. The Ministry of Justice controlled the general and administrative courts, the Religious Affairs Ministry controlled the religious courts, and the Defence and Security Ministry controlled the military courts.[46] By contrast, the Supreme Court had responsibility only for the 'technical-judicial' performance of the lower courts and exercised its control primarily by hearing appeals, supervising these courts (such as by issuing practice notes, discussed below), and helping to train lower court judges.

Patterns of judicial recruitment and promotion in any country are often shaped by the legal tradition that country follows. For example, in many civil law countries, it is said that judicial positions are considered to be primarily clerical.[47] This thinking is said to derive from the Napoleonic French Civil Code, which was drafted to be complete and 'infallible', partly to remove judicial discretion, which during the French *ancien regime* was thought to have been widely abused. Presuming this completeness and infallibility, it has traditionally been thought that the task of judging is primarily an administrative one—that is, identifying the relevant Code provisions and then applying them to the concrete case before the court.[48] On this view, judging can be performed by relatively young law graduates, provided they are well-trained in legal and judicial method. And given that the judicial

[40] Mertokusumo (n 29) 26–27. [41] Halim (n 36) 85. [42] Mahkamah Agung (n 14) 167.
[43] Mahkamah Agung (n 12) 143.
[44] Art 4(3), Law 14 of 1985 on the Supreme Court (as amended by Law 5 of 2004 and Law 3 of 2009).
[45] The requirement that judges be civil servants was removed by the packet of judiciary laws issued in 2009: Law 48 of 2009 on Judicial Power; Law 49 of 2009 on the General Courts; Law 50 of 2009 on the Religious Courts; and Law 51 of 2009 on the Administrative Courts.
[46] Purwoto Gandasubrata, 'The Judiciary in Transition (Fifty Years Development of the Indonesian Judiciary and Its Problems)' (1997) 3(1) *Indonesian Law and Administration Review* 6, 17.
[47] John Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (2nd edn, Stanford University Press 1985).
[48] Lasser (n 25) 1327; Merryman (n 47) 36.

function is presumed to be largely mechanical, the judiciary can be quite legitimately administered by the government. Good service can be rewarded with promotion, following a system used for other government officials. This presumption also explains why civil law systems do not have formal systems of precedent: if the Code is 'perfect', then there is no need for judges to make law.

In many countries, this financial and administrative influence has not translated into government interference in actual cases. In Indonesia, however, this control was regularly wielded to extract decisions favourable to the government, particularly under Soeharto's rule.[49] The continuing employment, pay, promotion, and favourable postings of judges were made largely contingent upon their compliance with the will of the state.[50] The result was that the New Order government lost very few cases. In fact, the judiciary's dependence on the executive became so complete under Soeharto that Indonesian lawyers would often refer to 'telephone justice', meaning that judges' decisions were not based on the evidence before them but on telephoned instructions from the presidential palace. As Lev has written:

> Indonesia stands out for the extent to which its state was reduced to institutional shambles over a period of forty years … not a single principal institution of the state remained reasonably healthy. Corruption, incompetence, mis-orientation, and organisational breakdown were characteristic. The courts, prosecution and police were underfunded and self-funded. All had been subjugated by political authority since at least 1960 and allowed substantial leeway, within the terms of their subordination, to fend for themselves. Legal process had little integrity left … [51]

By 'self-funded', Lev meant that because the courts were underfunded by the state, they needed to find their own revenue streams, so bribery became routine. As an Indonesian lawyer has said, courts were no longer 'a house of justice [*kantor pengadilan*] but instead an auction house [*kantor lelang*]. An auction house for cases … '[52] We discuss this further in Chapter 14.

Significant reforms of the judiciary were attempted in the post-Soeharto period, including making the courts administratively, organizationally, and financially independent of government, as we show below. Most Indonesian courts are now administered by the Supreme Court rather than government departments, and, since 2009, judges are 'state officials' (*pejabat negara*) rather than civil servants (*pegawai negeri*). However, according to some accounts, the main effect of this change has simply been to change the superiors to which judges must now give their allegiance. On this view, instead of being beholden to the government, Indonesian judges have become dependent on Supreme Court officials, with whom they must build 'good relationships' for their careers to progress. The result, some claim, may have reduced political interference by the executive but it has done

[49] Mahkamah Agung, *Blueprint for the Reform of the Supreme Court of Indonesia* (Supreme Court of Indonesia 2003); Pompe (n 8).

[50] DS Lev, 'Judicial Authority and the Struggle for an Indonesian Rechtsstaat' (1978) 13 *Law and Society Review* 37, 55–56; Asia Watch, *Human Rights Concerns in Indonesia and East Timor* (Asia Watch Committee 1988) 169. The incentives to toe the line were strong. Indonesia is a strikingly diverse country, with major cities, particularly those in Java, offering a decent lifestyle for the middle to upper classes. There is, therefore, a tendency for judges to be reluctant to be posted outside of Java. Many other parts of Indonesia, such as Sulawesi, Kalimantan, and Eastern Indonesia, for example, are, for most judges, far less coveted posts. Additionally, there are so-called hardship posts riddled with social or religious unrest such as Aceh and Papua: KHRN and LeIP, *Menuju Independensi Kekuasaan Kehakiman: Position Paper* (Indonesian Center for Environmental Law; Lembaga Kajian dan Advokasi untuk Independensi Peradilan 1999).

[51] Daniel S Lev, 'Comments on the Judicial Reform Program in Indonesia', *Seminar on Current Developments in Monetary and Financial Law, International Monetary Fund* (2004).

[52] John Pemberton, 'Open Secrets: Excerpts from Conversations with a Javanese Lawyer, and a Comment' in Vicente Rafael and Rudolf Mrazek (eds), *Figures of Criminality in Indonesia, the Philippines, and Colonial Vietnam* (Southeast Asia Program Publications Southeast Asia Program Cornell University 1999) 200.

little to end institutionalized bribery. In fact, as we argue in Chapter 14, it may even have further entrenched corruption by strengthening patronage networks within the judiciary.[53]

One result of the judicial career system—and how employment in other legal sectors is managed—is that lawyers rarely move between legal professions. It is, for example, unusual for a judge to leave the bench to become a lawyer. Private lawyers almost never become prosecutors or judges; and prosecutors almost never take up private practice or a judicial post.

However, this professional siloing began to change in the post-Soeharto era, with some lawyers and academics being selected to work in Indonesia's courts. Non-career judges can now be appointed to the Supreme Court, although they must have more than twenty years' legal experience, meet various other requirements, and, like other Supreme Court judicial appointments, endure a fit and proper test, conducted by the national legislature, the DPR (*Dewan Perwakilan Rakyat*, People's Representative Assembly).[54]

The reasons for using non-career Supreme Court judges have not, to our knowledge, been officially explained but the main reason is probably that having non-career judges increased the chances of proposed Supreme Court reforms taking hold. Many of these reforms were outlined in the ambitious 2003 *Blueprint for Judicial Reform in the Supreme Court*, developed by the Court in partnership with a leading legal reform NGO, LeIP.[55] It was presumed, correctly in our view, that long-serving judges would resist reforms that threatened the status quo, including the corruption networks that had made many of them very wealthy.[56] Perhaps the most important non-career appointment was Professor Bagir Manan—a well-respected constitutional scholar at the University of Padjadjaran—as Chief Justice of the Supreme Court. Under his leadership (2001–08), many major reforms were attempted, despite internal resistance. Some of these, such as the *satu atap* reforms (or 'one roof' reforms, discussed below) and publishing Supreme Court decisions online, enjoyed success. However, others were less successful, leaving Indonesia with what can still only be described as a largely dysfunctional judicial system.

It is also significant that several hundred senior lawyers and academics have been appointed to several 'special courts' as ad hoc 'non-career' judges. The term 'ad hoc' in this context is a misnomer because, in practice, ad hoc judges are employed as judges for a particular period, rather than being 'called in' to sit on specific types of cases relating to their particular areas of expertise. Again, the main rationale for their use appears to be to prevent career judges derailing important reforms. Assessments of the performance of ad hoc judges have, unfortunately, been mixed.[57]

POST-SOEHARTO JUDICIAL REFORMS

Since the fall of Soeharto in 1998, important structural reforms have been made to Indonesia's judicial system. In addition to the Constitutional Court's establishment (discussed below), new statutes were enacted relating to the Supreme Court and the courts below it in 2004[58] and 2009.[59] A primary purpose of these reforms was to provide a legal

[53] For a more detailed discussion of these issues, see Butt and Lindsey (n 20).

[54] See Art 7, 1985 Supreme Court Law (as amended by Law 3 of 2009).

[55] LeIP, Institute of Advocacy and Study for an Independent Judiciary (*Lembaga Kajian dan Advokasi untuk Independensi Peradilan*).

[56] We discuss judicial corruption in Chapter 14.

[57] We discuss the use of ad hoc judges in corruption courts in Chapter 14.

[58] Law 4 of 2004 on Judicial Power, which replaced a 1970 Law with the same title and subject matter; Law 5 of 2004, which amended Law 14 of 1985 on the Supreme Court; Law 8 of 2004, which significantly amended the General Courts Law (Law 2 of 1986); and Law 9 of 2004, which amended Law 5 of 1986 on the Administrative Courts.

[59] Law 48 of 2009 on Judicial Power, Law 49 of 2009 on the General Courts, Law 50 of 2009 on the Religious Courts, and Law 51 of 2009 on the Administrative Courts.

basis for transferring control over the organizational, administrative, and financial affairs of the lower courts from the government to the Supreme Court—the so-called 'one roof' (*satu atap*) reforms, mentioned above. This, it was hoped, would help improve judicial independence.

The *satu atap* reforms are widely regarded as having been successful—at least to the extent that the government is now rarely accused of attempting to influence judicial decisions. Even though most judges serving at the time of the reforms had spent most of their careers subservient to government, many of them were said to detest government interference, and, therefore, embraced the new culture of independence with some vigour.[60] As mentioned, allegations of judicial bias in favour of government are now rarely heard, and the state has lost many important cases against private entities and citizens since 1998. Indeed, since Soeharto's fall, the political and legal power previously held in the presidency has been effectively dispersed among a range of institutions, including legislatures, courts, and local administrations, so the Indonesian state is no longer synonymous with the Indonesian presidency, or even the national government. Even if the courts were still inclined to side with the government, it is now unclear which institution or tier of government that would be.[61]

However, while apparently successful in meeting its primary goals, *satu atap* has brought with it the significant problems mentioned above—particularly the administrative overburdening of the Supreme Court, as exemplified by its large caseload. These reforms have also not gone any considerable way towards remedying two particular problems that continue to plague Indonesia's judiciary. The first, judicial competence, was also targeted in the 2003 Supreme Court Blueprint. As former Chief Justice Bagir Manan himself explained in an introduction to part of the Blueprint, one weakness of the Indonesian judiciary is the quality of its judges. He blamed this on the generally low quality of legal education, the best students not wishing to become judges, and the lack of financial support for continuing judicial education.[62] He also lamented the failure of judges to keep up with rapid legal developments—particularly regulatory change—and for lacking skill.[63] His concerns are shared by many other legal commentators.

However, perhaps the most fundamental problem with Indonesia's judiciary is, as we suggest above, corruption, which, as mentioned, we discuss in Chapter 14. Suffice to say here that judicial corruption—that is, litigants being able to 'buy' decisions, sometimes through an auctioning process with other parties to a legal dispute—appears to be more prevalent than ever before. The result is that, even though Indonesian courts appear now largely to be independent of the state, overall, they still do not provide an effective forum for the impartial resolution of cases.

OVERVIEW OF JURISDICTION AND APPEALS

Indonesian courts have a reputation in some circles for taking excessive time to resolve cases.[64] In fact, Indonesian courts dispose of most of their cases relatively quickly.[65]

[60] Butt and Lindsey (n 19) 204–08.

[61] Simon Butt and Nicholas Parsons, 'Judicial Review and the Supreme Court in Indonesia: A New Space for Law?' (2014) 97 *Indonesia* 55–85.

[62] Bagir Manan, 'Forward', *Policy Paper on Permanent Judicial Education System Reform* (Supreme Court of Indonesia 2003).

[63] Ruddy Gobel, 'Tegakkan Hukum, Perbaiki Sistem Hukum' *Bali Post* (20 January 2003).

[64] Hans Thoolen, *Indonesia and the Rule of Law: Twenty Years Of 'New Order' Government: A Study* (F Pinter 1987).

[65] Rapid case disposal appears to be at least partially attributable to improvements to judicial administration and regulatory changes. In September 2009, the Supreme Court Chief Justice issued Circular Letter 138/KMA/SK/IX/2009 on Time Limits for Handling Cases in the Supreme Court. The Circular requires that the Supreme Court decide each case and send it back to the district court at which the case was first lodged within

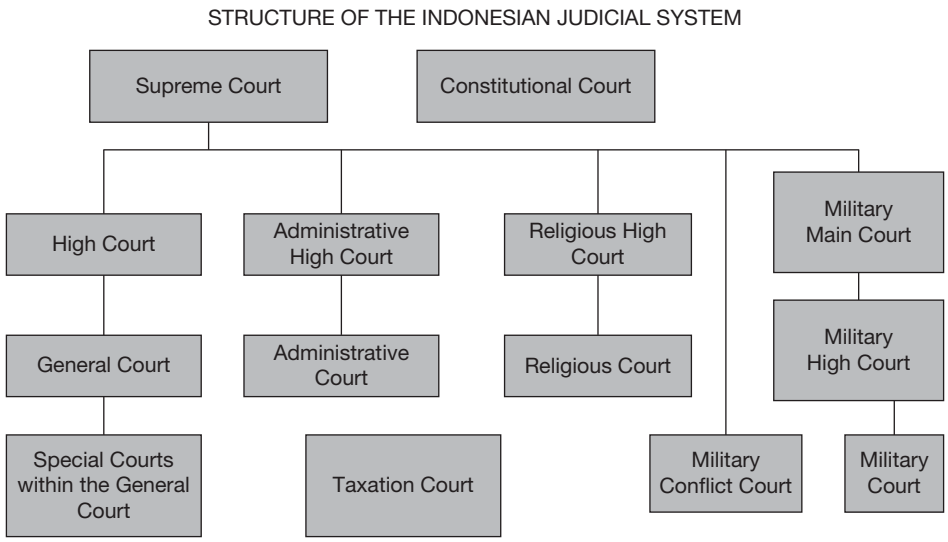

Figure 4.1 Structure of the Indonesian judicial system

However, obtaining a binding and enforceable resolution of a case is a different matter. This can be time-consuming and complex, with many levels of appeal also making litigation in Indonesia expensive because each party covers their own legal costs, even if they win.[66]

As Figure 4.1 shows, four branches of the judicature in Indonesia exist under the Supreme Court (*Mahkamah Agung*): the general courts (*pengadilan umum*); the military courts *(pengadilan militer*); the religious courts (*pengadilan agama*); and the administrative courts (*pengadilan tata usaha negara*). The general courts also house 'special courts' (*pengadilan khusus*), discussed further below. Although there are exceptions, most cases are handled by a panel of three judges.[67] There is a preference for a decision to be reached among them by consensus but if this is not possible, then dissenting judgements can be included in the decision, although this remains rare outside the Constitutional Court.[68]

From most of these courts, there are two levels of appeal.[69] The first is to a high court (*pengadilan tinggi*). The second is an appeal, called cassation (*kasasi*), to the Supreme Court. As discussed below, Indonesian procedural laws impose strict time limits within which appeals must be lodged. If these are not met, then the parties will be 'deemed to have accepted' the most recent decision, which then becomes final, binding, and enforceable.[70]

The Constitutional Court sits outside this organizational hierarchy. It has nine judges and is a court of first and final instance in the matters over which it has jurisdiction. We discuss the Constitutional Court in the next chapter of this book.

one year from the date of registration at the Supreme Court. As for other courts in Indonesia's judicial hierarchy, Supreme Court Circular Letter 6 of 1992 (21 October 1992) requires district and high courts to resolve cases within six months of lodgement.

[66] The courts typically order the losing party to pay 'court fees', which is usually a relatively small sum: Arts 181 and 182, Civil Procedure Code (that is, the amended *Herziene Indonesisch Reglement* or HIR, which applies in Java and Madura.

[67] Art 11(1), Law 48 of 2009 on Judicial Power.

[68] Art 30(2) and (3), Supreme Court Law as amended by Law 5 of 2004; Art 14(3), Law 48 of 2009 on Judicial Power.

[69] As discussed below, the decisions of some first instance courts are directly appealable to the Supreme Court.

[70] Art 46(2), Supreme Court Law.

First instance courts

District courts

First instance district courts (pengadilan negeri or state court), which form part of the broader category of 'general courts' (*pengadilan umum*), hear and decide most civil litigation and criminal prosecutions in Indonesia.[71] These courts have jurisdiction over any matter not falling within the jurisdictions of other courts, including general criminal and civil cases and many commercial matters.[72] There are well over 300 of these district courts, located in every county and city, with jurisdiction over disputes arising in the territory in which they are located.[73] Together these courts hear many cases. In 2016, for example, they decided more than 3.3 million cases.[74] The vast majority of these are categorized as *pidana cepat* (literally 'fast crimes', meaning that they are disposed of with abbreviated summary procedures), involving misdemeanours (*tindak pidana ringan*) and traffic offences.[75] The workload of the courts is spread unevenly, with some of them handling an unworkably large number of cases and others hearing so few that it raises questions about why they exist.

Special courts

District courts in particular cities of Indonesia also house special courts or chambers, established to hear and decide particular types of cases. The rationale provided in the 2009 Judiciary Law for special courts is that they help provide 'expertise and experience' in a specific field.[76] To this end, most of these courts employ ad hoc judges. Many of these special courts are discussed in other chapters of this book. Here, we simply provide an introductory overview of their relative jurisdictions.

The commercial courts (*peradilan niaga*) primarily hear intellectual property and bankruptcy cases. They are located in Indonesia's five largest cities—Jakarta, Makassar, Medan, Surabaya, and Semarang. They were hastily established at the behest of the International Monetary Fund in the wake of Indonesia's economic collapse from 1997 and were filled with judges who received only limited training.[77] These courts trialled various procedures and features associated with common law legal systems, including dissenting opinions and non-career judges, which were later adopted by other Indonesian courts. However, the lack of proper preparation for establishment of the commercial courts led them to quickly develop a reputation for lack of professionalism. As a result, they now hear relatively very few cases, with Indonesian lawyers sometimes joking that they are 'the only Indonesian courts where the grass grows long in the car park'. For example, in 2016, only 424 cases were lodged with these courts across Indonesia, up from 316 cases in 2015.[78]

Indonesia has permanent human rights courts, which adjudicate cases of genocide and crimes against humanity. These courts were established under the 2000 Human Rights Courts Law[79] after military-led violence in East Timor (now Timor Leste) following the referendum for independence in 1999. This Law also allows the DPR to establish an ad hoc human rights tribunal to adjudicate allegations of human rights violations perpetrated before the Law itself was enacted in 2000. However, these courts are now rarely used, if at

[71] Art 25(2), Law 48 of 2009 on Judicial Power.
[72] Law 2 of 1986 on the General Courts, amended by Laws 8 of 2004 and 49 of 2009.
[73] Art 4, General Courts Law as amended by Law 8 of 2004. [74] Mahkamah Agung (n 12) 85.
[75] Mahkamah Agung (n 14) 88. [76] Art 8(2), General Court Law as amended by Law 49 of 2009.
[77] Tim Lindsey, 'The IMF—and Insolvency Law Reform in Indonesia' (1998) 34 *Bulletin of Indonesian Economic Studies* 119.
[78] Mahkamah Agung (n 12) 91. [79] Law 26 of 2000 on the Human Rights Court.

all.[80] The ad hoc human rights tribunals established to examine the Timor Leste violence and the Tanjung Priok massacre are discussed in Chapter 13.

Fisheries crime courts have been established in the general courts of several coastal areas, including North Jakarta, Medan, Pontianak, Bitung, Tua, Tanjung Pinang and Ranai, and now Ambon.[81] These courts have jurisdiction to try cases involving various fishing-related crimes, including: using illegal fishing means and equipment (such as chemicals or explosives); causing significant water pollution; and exporting or importing fish that do not meet health and other standards. However, they hear few cases. In 2016, for example, the fisheries courts decided only 214 cases.[82]

The taxation court resolves taxation disputes between citizens and the government. This is a single court, sitting in Jakarta, although it can hear cases in other places.[83] While its technical-legal competence is supervised by the Supreme Court, the taxation court is the only court administered by the government (the Finance Ministry) rather than the Supreme Court.[84] There is no appeal from its decisions, though dissatisfied applicants can apply to the Supreme Court for a *Peninjauan Kembali* (PK) reconsideration, discussed below.

Anti-corruption courts are located in all thirty-four provincial capital cities of Indonesia. They have exclusive jurisdiction to adjudicate corruption cases under Indonesia's Anti-Corruption Law.[85] Previously, Indonesia had only one anti-corruption court, located in Jakarta and established in 2004, which shared jurisdiction over corruption cases with the general courts. We discuss this court in more detail in Chapter 14.

The industrial relations court hears employment-related disputes, including those involving workers' rights, dismissals, and disagreements between trade unions.[86] This court also registers and enforces agreements or awards negotiated between employers and employees.[87] We discuss this court in Chapter 17.

Children's courts hear cases involving children under eighteen years of age. Their proceedings are intended to protect the interests of the child and designed to be non-intimidating. Trials are, for example, generally closed and conducted in a 'familial atmosphere' (*suasana kekeluargaan*) by selected judges and other law enforcers.[88]

Administrative courts

There are thirty-one administrative courts across Indonesia.[89] They have jurisdiction to hear and decide disputes between Indonesian citizens and the government over 'administrative decisions'. These are defined in Article 1(9) of the amended 1986 Administrative Court Law[90] as decisions:

- in writing;
- produced by a state agency or official;
- containing concrete, individual and final determinations; and
- having legal consequences for specified individuals or legal entities.

[80] Indeed, it appears that the Supreme Court has even stopped reporting about their activities. They were the only branch of courts not mentioned in the Supreme Court's Annual Report for 2016.

[81] Law 31 of 2004 on Fishery, as amended by Law 45 of 2009. [82] Mahkamah Agung (n 12) 88.

[83] Art 4, Law 14 of 2002 on the Taxation Court. [84] Art 5, Law 14 of 2002 on the Taxation Court.

[85] Art 5, Law 46 of 2009 on the Anti-corruption Court.

[86] Art 2, Law 2 of 2004 on Settlement of Industrial Relations Disputes.

[87] Art 7, Law 2 of 2004 on Settlement of Industrial Relations Disputes.

[88] Art 18, Law 11 of 2012 on the Children's Criminal Justice System. See also Supreme Court Regulation 4 of 2014 on Guidelines for Diversion in the Children's Court System.

[89] See the list of administrative courts and their addresses on the Palembang Administrative Court website: <http://ptun.palembang.go.id/index.php?option=com_content&view=category&layout=blog&id=44&Itemid=19>.

[90] Law 5 of 1986 on the Administrative Courts, as amended by Laws 9 of 2004 and 51 of 2009.

Article 2 of the Administrative Court Law excludes some types of government acts from this definition, including administrative decisions that:

- are civil legal acts;
- have not yet been formally approved;
- are regulations with general application or issued pursuant to a criminal law;
- were issued based on a judicial investigation;
- concern military administration; or
- concern electoral results.

As explained in Chapter 12, the administrative courts have also decided that they lack jurisdiction to review presidential decisions on clemency applications.

Administrative decisions can be challenged on two grounds. The first is that the decision 'breached applicable law'. To succeed on this ground, the applicant must identify a law that the administrative decision contravened. The second ground is that the administrative act breached 'principles of good governance'. These are defined in the Elucidation to Article 53(2)(b) of the Administrative Court Law as legal certainty, orderly state administration, openness, proportionality, professionalism, and accountability.[91] Although these principles are broad concepts, they can be difficult to establish in practice because Indonesian courts construe them narrowly.[92] The failure of an administrative official to make an administrative decision when that official must make one is also classified as an administrative decision.[93]

Any person or legal entity whose interests have been damaged by an administrative decision has standing to challenge that decision before the administrative courts and, if successful, can seek various remedies, including the invalidation of the administrative decision and compensation.[94]

Although the introduction of Indonesia's administrative courts in 1991 was initially heralded as a mostly positive development,[95] they are now widely regarded as being ineffective, and manage a relatively small caseload.[96] The efficacy of the administrative courts is significantly weakened by the time limits within which challenges to administrative decisions must be lodged with the Court. Article 55 of the 1985 Administrative Court Law precludes applicants named in an administrative decision from challenging that decision after ninety days from the date the decision was published or the applicant received it. Citizens or entities adversely affected by a decision that does not name them have ninety days from the time their interests were affected.[97] Administrative courts will generally refuse to consider applications that are not brought within time. The problematic enforcement procedures discussed later in this chapter also bring the utility of the administrative courts into question.

[91] The Elucidation to Art 53(2)(b) refers to the definition of these terms as set out in Law 28 of 1999 on State Administration Clean and Free from Corruption, Collusion, and Nepotism.

[92] Mas Ahmad Santosa, Jhosi Khatarina, and Rifqi Assegaf, 'Indonesia' in R Lord and others (eds), *Climate Change Liability* (Cambridge University Press 2012) 191–92.

[93] Art 3, Law 5 of 1986 on the Administrative Courts.

[94] Art 53(1), Law 9 of 2004 amending Law 5 of 1986 on the Administrative Courts.

[95] See, for example, Bernard Quinn, 'The Administrative Review Act of 1986: Implications for Legal and Bureaucratic Culture' (Honours Thesis, Australian National University 1994); Julian Millie, 'The Tempo Case: Indonesia's Press Laws, the Pengadilan Tata Usaha Negara and the Indonesian Negara Hukum' in Timothy Lindsey (ed), *Indonesia: Law and Society* (1st edn, Federation Press 1999).

[96] 2,022 cases were received in 2016, up 11.8 per cent from the 1,809 received in 2015: Mahkamah Agung (n 12) 96–97.

[97] See Part V of Supreme Court Practice Note 1 of 1991 on Guidelines on the Implementation of Provisions of Law 5 of 1986 on the Administrative Courts.

Religious courts

Indonesia's religious courts have jurisdiction to hear and decide disputes between Muslims about the matters listed in Article 49(1) of Law 7 of 1989 on the Religious Courts, as amended by Laws 3 of 2006 and 50 of 2009. These are marriage (*perkawinan*); succession (*waris*); gifts (*hibah*); bequests (*wakaf*); payment of alms (*zakat*); charitable gifts (*infaq*); gifts to the needy (*shadaqah*); and the 'shari'a economy' (*ekonomi syari'ah*). In practice, however, the bulk of the courts' work comprises divorce applications, most of which are brought by women.[98] In fact, in 2010, 98 per cent of all cases heard by religious courts were divorce-related. Sixty-five per cent of these cases were brought by women and they succeeded in nine out of ten cases. Men, by contrast, win only about half their cases. These courts are thus best understood as essentially 'divorce on demand' courts for Muslim women.[99]

In 2008, Article 49(1) was challenged before the Constitutional Court, with the applicant arguing that the Constitution, which provides various religion-related rights, requires that the state administer and enforce Islamic law in its entirety, including public law.[100] The Court disagreed, holding that the state had power to regulate Indonesia's courts and could, therefore, determine the jurisdiction of the religious courts.[101] Limiting the matters over which the religious court could adjudicate did not violate the constitutional freedom of religion.

This decision was also significant simply because the religious courts are one of the largest and most active branches of the Indonesian judiciary. They have about the same number of court buildings as the district courts (*pengadilan negeri*) but their caseload is much greater in many parts of Indonesia:

> In 2010, litigants brought 320,768 judicial proceedings to the Religious Courts, compared to 164,361 for the General Courts. On this reading, the Religious Courts have almost 100 per cent more cases than the general Courts, despite the combined civil and criminal jurisdiction of the latter and the tightly restricted jurisdiction of the former.[102]

The disparity is even more striking with civil litigation:

> In 2010, for example, there were 366,971 civil cases in the religious and general courts combined, of which 291,513 dealt with dissolution of marriage. Divorce cases thus represented 80 per cent of contested cases heard in Indonesia that year. The Religious Courts decided 98 per cent of them and the General Courts … only 2 per cent.[103]

It is much to the credit of these courts that, despite their huge workload and generally poor resourcing, litigants and lawyers generally rate them as clean, competent, and efficient. This perception was consistent across a range of surveys of court users conducted from 2001 to 2009. An Asia Foundation/AC Neilsen survey in 2001, for example, rated the religious courts above all other courts (and indeed, all other government institutions in Indonesia) for honesty and effectiveness, finding it 'particularly striking' that they rated highly for the criteria 'does its job well' and 'is trustworthy'. Another survey in 2008 and 2009 similarly found that religious courts treated litigants with respect and were quick and efficient—even 'very relaxing'![104] The religious courts are thus among the most efficient and least corrupt courts in Indonesia. More details about the cases handled by the religious courts can be found in Chapter 22, which deals with family law and inheritance.

[98] Cate Sumner and Tim Lindsey, *Courting Reform: Indonesia's Islamic Courts and Justice for the Poor* (Lowy Institute for International Policy 2010).

[99] Lindsey (n 15) 285–86.

[100] Constitutional Court Decision 16/PUU-VI/2008.

[101] Simon Butt, 'Islam, the State and the Constitutional Court in Indonesia' (2010) 19(2) *Pacific Rim Law & Policy Journal* 279.

[102] Lindsey (n 15) 257. Case numbers for the General Courts exclude *pidana cepat* or summary cases.

[103] ibid. As discussed in Chapter 22, the general courts have jurisdiction for non-Muslim divorces.

[104] See the Asia Foundation/AC Neilsen and IALDF/PPIM surveys cited in ibid 259–60.

Finally, the religious courts of Aceh—the 'Syariah Courts' (*Mahkamah Syar'iyah*)—have a much broader jurisdiction than the religious courts found elsewhere in Indonesia, and can try matters relating to Islamic criminal offences. The Aceh courts are discussed in Chapter 10.

Military courts (pengadilan militer)

Indonesia has a relatively complex system of military courts, comprising four branches: general military courts (*pengadilan militer*); high military courts (*pengadilan tinggi militer*); supreme military courts (*pengadilan utama militer*); and the conflict court (*pengadilan pertempuran*).[105] They have jurisdiction over military personnel, and adjudicate criminal matters and military administration.

Which of these courts will hear a given dispute depends primarily on the type of dispute being heard and the rank of the defendant. As a rule, the general military court located in either the place in which an alleged crime took place, or in the geographic area in which the defendant's unit is located, will have jurisdiction to hear the case at first instance.[106] However, general military courts can only hear cases involving officers below the rank of captain.[107] The high military court has jurisdiction over soldiers ranked major and above, and hears military administration matters at first instance.[108] Both the high and supreme military courts can hear appeals from the general military court,[109] unless the defendant has been acquitted of all charges or is freed from all claims because of a breach of procedural law during the court process.[110] The supreme military court also hears appeals from the high military courts in cases involving military administration issues.[111] Where crimes involving soldiers take place in conflict areas, the case is heard at first instance by a military conflict court.[112] This is a mobile court with jurisdiction over all conflict zones. Its decisions cannot be appealed to a military high court but only to the Supreme Court.

Proposals for reforming the military court system have been strong and sustained since the fall of Soeharto, who led a regime that relied heavily on the armed forces to maintain power and rarely held them accountable for their actions. Indeed, the Indonesian government committed to amend the Military Court Law during United Nations Periodic Reviews conducted in 2007 and 2012, but had not yet done so at time of writing.

Two related issues are at the heart of proposed reform. The first is the extent to which military personnel should be subject to civilian laws. Military courts have traditionally heard criminal cases involving military personnel, even if the alleged crime was entirely unrelated to the defendant's military position. The use of military courts to try soldiers for crimes clearly committed in their capacity as civilians has caused controversy, largely because military court processes have tended to produce acquittals or lighter sentences for military officers than would probably have been imposed by a civil court.

Article 65(2) of the 2004 National Armed Forces Law appears directed towards stamping out this practice.[113] It states that '[s]oldiers fall under the jurisdiction of the military court for violations of military criminal law and under the jurisdiction of the general courts for violations of general criminal law'.[114] However, in practice, this provision is routinely

[105] Art 12, Military Court Law.
[106] Art 10, Military Court Law.
[107] Art 40, Military Court Law.
[108] Arts 15(2) and 41, Military Court Law. The Military High Court does not have jurisdiction to hear disputes about administrative decisions made during times of war, danger, natural disasters, other extraordinarily dangerous conditions, or states of emergency (Art 4, Military Court Law).
[109] Art 15(3), Military Court Law.
[110] Art 219, Military Court Law.
[111] Art 15(4), Military Court Law.
[112] Art 45, Military Court Law.
[113] Law 34 of 2004 on the Indonesian National Armed Forces.
[114] See also Art 3(4)(a), MPR Decision VII of 2000, which states that 'TNI soldiers are to fall under the jurisdiction of the military courts if they violate military law, and under the jurisdiction of the general courts if they breach general criminal law'.

flouted, with military personnel often tried in military courts for non-military crimes. Some commentators argue that this will not change until an equivalent provision is added to the Military Courts Law.[115]

The second issue is the *koneksitas* system. If a military officer and a civilian are allegedly involved in the commission of a single crime, they will sometimes be tried together in *koneksitas* proceedings.[116] The question becomes whether, if tried together, their case will be heard in the general courts or the military courts. Before 2009, the general rule was that if the crime is essentially military in nature but with some civilian complicity, then the matter should be heard in a military court, led by a military court chief judge, with at least one general court judge presiding. If the crime was essentially civilian in nature and committed by civilians with some military complicity, the case should be heard in the general court, led by a general court chief judge, but with at least one military court judge presiding.[117]

The rationale behind *koneksitas* has, to our knowledge, never been clearly formulated, at least not officially. It appears to be that trying civilians and military personnel in one court rather than two separate courts maintains uniformity and justice,[118] and presumably prevents two courts from handing down substantially different sentences to perpetrators for the same crime.[119] However, use of *koneksitas* procedures has been inconsistent. In particular, in some cases military personnel and civilians involved in the same crime have been dealt with separately in their respective courts. It is often claimed that, for military officers, having their cases heard in the military courts is a significant advantage, because military courts are more likely to impose a lighter sentence upon them, even for crimes of a non-military nature.

Indonesia's 2009 Law on Judicial Power[120] now provides, in Article 16, that crimes allegedly perpetrated jointly by soldiers and civilians should be heard in the general courts, rather than the military courts, unless the Supreme Court Chief Justice determines otherwise. Some reformers have argued that *koneksitas* should be abolished altogether, given its potential for granting leniency to military personnel compared with civilians, or even impunity.[121]

Provincial appeals courts

High courts (*pengadilan tinggi*), located in Indonesia's provinces, have jurisdiction to hear appeals from most first instance courts. A panel of at least three high court judges reviews each appeal. There are usually no hearings and no opportunities for verbal submissions, with the panel relying exclusively on the appeal documents and the first instance decision. If the high court believes that the district court negligently applied the law, made a mistake or was not complete in its examination, the high court can remit the case to the district court with an order to correct, or can make a correction itself (Article 240(1) of the Code of Criminal Procedure (*Kitab Undang-undang Hukum Acara Pidana*, KUHAP)). If necessary, the high court can vacate a district court decision before issuing its own (Article 240(2)).

[115] 'Disayangkan, Nasib RUU Peradilan Militer Terkatung-Katung' *Hukumonline* (3 February 2010).
[116] Sumaryanti, *Peradilan Koneksitas di Indonesia: Suatu Tinjauan Ringkas* (Bina Aksara 1987).
[117] Art 94(2) and (3), KUHAP.
[118] BPHN, *Analisis dan Evaluasi Hukum tentang Putusan Pengadilan Militer dalam Perkara Koneksitas* (Badan Pembinaan Hukum Nasional, Departemen Kehakiman 1996) 3.
[119] Although such discrepancies seem to occur anyway. The *koneksitas* court has sometimes inexplicably handed down lighter sentences for military personnel than civilians involved in the same crime: see cases set out in ibid 30–35.
[120] Law 48 of 2009.
[121] 'Komitmen Pemerintah Mereformasi Peradilan Militer Dipertanyakan' *Hukumonline* (2 July 2009).

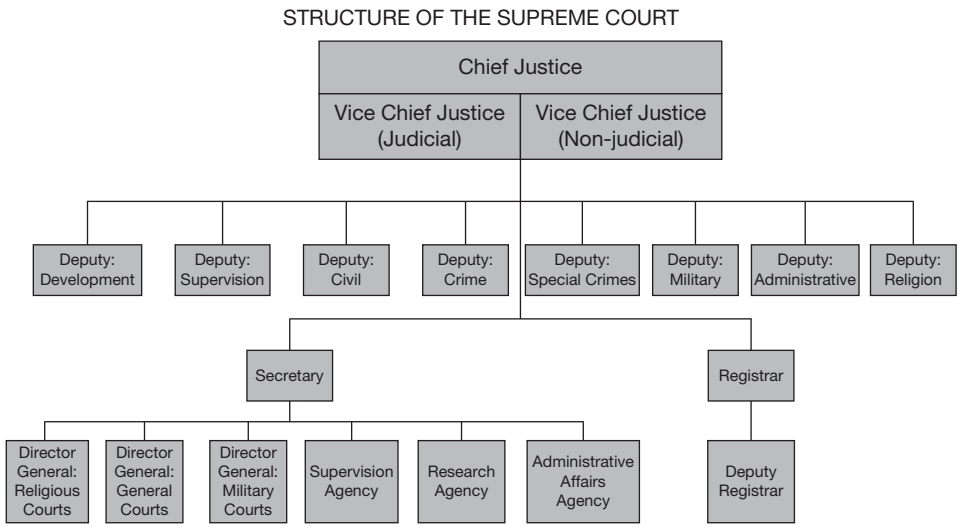

Figure 4.2 Structure of the Supreme Court

Generally speaking, appeals against decisions in civil cases (including those heard by the general, administrative, and religious courts) must be lodged with the chief judge of the court that made the decision against which an appeal is sought, within fourteen days of the party being notified of the decision.[122] Within fourteen days of receiving the application for appeal, the district court registrar must inform the other party of the appeal. Both parties then have one month to submit their arguments to the high court.[123]

Decisions in criminal cases can also be appealed to a provincial high court, unless the first instance court acquitted the defendant of all charges, in which case the prosecution cannot appeal.[124] However, as we show in Chapter 12, not every case in which the defendant 'wins' is classified as an acquittal for these purposes. The time limit for lodging a criminal appeal is seven days.[125]

In addition to exercising appellate jurisdiction, the high courts also have jurisdiction to hear and decide jurisdictional disputes between the first instance courts within their provinces.[126]

The Supreme Court

The Supreme Court (*Makamah Agung*) is in Jakarta, Indonesia's capital. As mentioned, the Supreme Court has jurisdiction to hear appeals from the lower courts under a process called 'cassation' (*kasasi*). These appeals comprise the bulk of the Supreme Court's work, although the Court has several other functions, discussed below. As mentioned, at time of writing, there were almost fifty Supreme Court judges. The Court has a chief justice (*Ketua*) and two vice chief justices (*Wakil Ketua*), one for judicial affairs and one for non-judicial affairs. The Court is divided into six judicial chambers (*kamar*), each led by a deputy chief justice (*Ketua Muda*): general criminal law, special crimes, administrative law, civil law, military law, and religious law. The Supreme Court also has two non-judicial chambers, each led by a deputy chief justice: development and supervision: see Figure 4.2.

[122] Art 7(1), Law 20 of 1947; Art 123(1), Law 5 of 1986.
[123] Art 11, Law 20 of 1947.
[124] Art 67, KUHAP; Art 26(2), Law 48 of 2009 on Judicial Power; Art 219, Law 31 of 1997.
[125] Art 233(2), KUHAP.
[126] Art 51(2), General Courts Law; Art 51(2), Law 5 of 1986; Art 51(2), Law 9 of 1989.

Cassation time limits and grounds

Formally, the main function of cassation courts in Indonesia and other civil law countries has traditionally been to ensure that lower courts are applying the law uniformly and correctly.[127] However, in practice the Indonesian Supreme Court will rarely confine itself to a purely legal enquiry, and often re-examines factual aspects of cases,[128] usually by defining factual issues as questions of law.

Each cassation application is handled by a panel of at least three Supreme Court judges. In most cases, they review the written documents relating to the application—primarily, the case file (which should include the previous judicial decisions) and the written submissions of the parties—and then produce a written decision. However, sometimes oral arguments or the questioning of witnesses is permitted. When this happens, the Supreme Court rarely conducts the examination, although it can, if it wishes. Instead, it usually remits the matter to the relevant first instance court, ordering it to hear any new witness testimony or receive any other evidence, and then provide a report.[129]

Applications for cassation in both civil and criminal cases must be submitted within fourteen days of the handing down of the decision against which an appeal is sought.[130] Once the application for cassation is registered, the applicant has a further fourteen days to submit a full cassation statement (*memori kasasi)* specifying the reasons for the cassation. The opposing party must be informed of the cassation application within seven days of its registration and, if it wishes to contest the legal claims made in the *memori*, must submit a counter application within fourteen days.[131]

The Supreme Court can hear cassation appeals against decisions of the provincial high courts and the first instance decisions of some special courts (such as the commercial and industrial relations courts). It cannot however, hear cassation appeals in the following four types of cases:[132]

- a pre-trial hearing (*praperadilan*), at which defendants challenge the legality of their arrest, detention, formal naming as a suspect, searches, or seizures, as discussed in Chapter 11;
- criminal cases where the maximum penalty is no greater than one year's imprisonment or a fine;
- administrative law cases where the lawsuit concerns the decision of a regional official and the scope of the decision is regional; and
- unconditional acquittals (Article 244 of the Code of Criminal Procedure). However, as explained in Chapter 12, the Supreme Court has taken the view since 2013 that it can hear an appeal against any acquittal.

These grounds are relatively narrow and allow many cases to be appealed all the way up to the Supreme Court. We note that the one-year limit on criminal cases does not refer to the actual sentence handed down against a defendant. Rather, it refers to the maximum penalty available for the crime for which the defendant was prosecuted. It is, therefore, possible for very minor infringements to be appealed all the way to the Supreme Court. In one famous case, a man fined by police for not buckling up his helmet while riding his motorcycle was able to challenge the fine before the Supreme Court.[133]

[127] R Subekti, *Law in Indonesia* (3rd edn, Center for Strategic and International Studies 1982); Merryman (n 47).
[128] Pompe (n 8). [129] Art 50(1), 1985 Supreme Court Law.
[130] Art 46(1), 1985 Supreme Court Law; Art 245(1), KUHAP; Art 55(1), Law 14 of 1985; Art 131, Law 5 of 1986; and Art 231, Law 31 of 1997.
[131] Art 47(3), 1985 Supreme Court Law.
[132] Art 45A(2), 1985 Supreme Court Law as amended by Law 5 of 2004. [133] Pompe (n 8).

When exercising its powers of cassation, the Supreme Court can overturn a lower court decision if one of three grounds is met:

- the decision did not fall within the jurisdiction/authority of the relevant court;
- the law was incorrectly applied; or
- there was failure to fulfil procedural requirements which, by law, should result in the annulment of the decision.[134]

A Supreme Court cassation decision is, in theory at least, immediately executable, although, as discussed below, enforcement problems are very common.

Peninjauan Kembali

Litigants have one final avenue to challenge the correctness of a judicial decision—the *peninjauan kembali* (PK). Often translated as 'judicial review', this avenue is better described as 'reopening' or 'reconsideration'. This is because the process involves the Supreme Court reopening and reassessing the decision of a lower court or even one of its own decisions (although if reviewing one of its own decisions, the panel of judges presiding over the review will be different to the one that heard the original cassation application). Although initially conceived as a means by which litigants could reopen cases in light of new evidence or manifest judicial error to prevent 'injustice', the PK has evolved into a de facto final judicial appeal that litigants commonly use, at least in high-profile cases.

PK applications are lodged with the registrar of the court that heard the case at first instance. The prerequisites and grounds for lodging a PK differ depending on whether the case is criminal or not.

Civil and administrative cases

Article 67 of the Supreme Court Law provides that a PK may be requested on the following grounds in civil, administrative, and religious court cases:

a. The decision was based on subsequently discovered deceit of a party to the litigation or based on fraudulent evidence.
b. New determinative evidence (known as a *novum*) is discovered after the case is decided.
c. The court awarded more than one party sought (for example, a court might have awarded more compensation to the plaintiff than the plaintiff asked for).
d. Without explanation, the court made no decision about part of the claim.
e. A court of the same level or higher reached a contrary decision in a similar case involving the same parties.
f. A clear judicial error was made.

Lodging a PK application does not formally prevent or delay the implementation of the decision being reviewed.[135] As mentioned below, a district or provincial court decision becomes binding and enforceable after the time limits for appeal have expired. Supreme Court cassation decisions are also immediately executable when they are handed down, at least in theory.[136] In practice, however, Indonesian courts often refuse to issue enforcement

[134] Art 30(1), 1985 Supreme Court Law, as amended by Law 5 of 2004.
[135] Art 66(2), 1985 Supreme Court Law.
[136] We discuss some of the commonly encountered problems faced by those seeking to enforce judicial decisions below.

orders for decisions that are under PK review if it is likely that judges will uphold the PK application on one of the Article 67 grounds.[137]

The Supreme Court can refuse to hear the PK case if the application is lodged more than 180 days after the applicant becomes aware of one of the Article 67 grounds.[138] Parties may lodge only one PK application, at least in civil cases.[139]

Criminal cases

The grounds for review of criminal decisions are different to those of civil decisions. To lodge a PK application and, ultimately, for it to succeed, the applicant must demonstrate one of the following:

- a new circumstance (*novum*) has come to light that, if known during the trial, would have probably resulted in a full acquittal, a dismissal of the public prosecutor's case or the case being brought under a less serious charge;
- a fact or situation established in one decision contradicts aspects of other cases; or
- an oversight or obvious mistake was made in the decision.[140]

If the defendant or prosecutor appeals to the high court or to the Supreme Court on cassation, the court hearing the appeal can impose a higher criminal penalty than the penalty imposed by the decision being appealed. It can, therefore, sometimes be risky for defendants to lodge these appeals. By contrast, a defendant has nothing to 'lose' by submitting a PK application. In a PK decision, the Supreme Court may not increase the penalty imposed in the most recent decision relating to the case.[141] Unlike in civil cases, there is no time limit for lodging PKs in criminal cases.[142]

Whether a defendant can lodge more than one PK in a criminal matter has been an issue of much recent debate and controversy. Until 2013, at least three statutes had prohibited multiple PKs. The 2009 Judicial Power Law (Article 24(2)) and the Supreme Court Law (Article 66(1)) imposed what appeared to be a blanket prohibition on lodging more than one PK in any case, stating, bluntly, that the Supreme Court cannot 'conduct a PK of a PK'. The Code of Criminal Procedure (Article 268(3)) contained a similar prohibition but only for criminal cases.

In 2013, former Chairperson of the Corruption Eradication Commission, Antasari Azhar, who was serving an eighteen-year sentence for murder, wanted to bring a second PK application to have his case reopened. He challenged the constitutionality of Article 268(3) of the Code of Criminal Procedure before the Constitutional Court. He succeeded, and the Constitutional Court invalidated Article 268(3). However, the Court's decision did not mention the Judicial Power and Supreme Court Law provisions prohibiting multiple PKs. In short, while the Court struck down a provision imposing the limitation in criminal cases, it left others in force that appear to impose the very same limitation for all cases, including criminal.

The result was uncertainty about whether lodging a second PK is possible. It was arguable that the Constitutional Court's decision should implicitly invalidate the one-PK restrictions in the Judicial Power and Supreme Court Laws to the extent that they would have otherwise applied to criminal cases. Former Constitutional Court Chief Justice Hamdan Zoelva argued this position in the media. However, the Supreme Court issued a practice note ordering lower courts not to pass on more than one PK application per case, pointing

[137] M Yahya Harahap, *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata* (Gramedia 1988) 323.
[138] Art 69, 1985 Supreme Court Law.
[139] Art 66(1), 1985 Supreme Court Law; Art 24(2), Law 48 of 2009 on Judicial Power.
[140] See Art 263(2), KUHAP; Art 248(2), Law 31 of 1997.
[141] Art 266(3), KUHAP Art 251(3), Law 31 of 1997.
[142] Art 264(3), KUHAP; Art 249(3) of Law 31 of 1997.

to the Judicial Power and Supreme Court Laws just mentioned.[143] This note appeared to defy the Constitutional Court ruling but the Constitutional Court could not do anything about it, because, as we show in the next chapter, it can only review and invalidate statutes. Its jurisdiction does not extend to Supreme Court practice notes.

In 2016 and 2017, the Constitutional Court took further steps to resolve the controversy. In two cases, it decided that because the substance of Article 24(2) of the Judicial Power Law and Article 66(1) of the Supreme Court Law were the same as Article 268(3), they were no longer binding as far as they related to criminal cases.[144] The Supreme Court now seems to have accepted this and, according to its Registry, it heard 3,487 PK requests in 2016, only 3.2 per cent of which were a 'PK of a PK decision'.[145]

Other issues relating to PKs, including whether prosecutors can appeal acquittals or dismissals, are discussed in more detail in Chapter 12.

Judicial review by the Supreme Court

According to Article 24A(1) of the Constitution, the Supreme Court has jurisdiction to review regulatory instruments 'below' a statute to ensure that they comply with statutes.[146] This jurisdiction is restated in the 2009 Law on Judicial Power[147] and the 1985 Supreme Court Law (as amended in 2004).[148] The word 'below' here appears to be a reference to Indonesia's hierarchy of laws, discussed in Chapter 2, which lists several types of legal instruments commonly issued in Indonesia, apparently in order of their authority. Included below statutes on this list are government regulations, presidential regulations, and regional regulations, although other types of 'lower-level' laws not specifically mentioned on the list would probably also be considered 'below' the level of a statute and hence reviewable as against a statute by the Supreme Court.

The Judiciary and Supreme Court Laws authorize the Supreme Court to annul a law below the level of statute on two grounds. The first is if its subject matter conflicts with that of a statute. The second is that the process by which it came into being did not comply with legislative requirements.[149] These two grounds of review are known in Indonesia as material review (*uji materiil*) and formal review (*uji formil*) respectively. Laws that the Supreme Court invalidates are no longer legally binding[150] and its judicial review decisions are not subject to appeal.[151] Judicial review applications can be brought before the Supreme Court by Indonesian citizens, indigenous communities, and public or private legal entities, provided they have suffered loss because of the law under review.[152]

The Supreme Court has had this judicial review power for several decades[153] but refused to exercise it during the Soeharto period, with few exceptions. After Soeharto's fall, the Court began hearing these cases and, since the mid-2000s in particular, appears to have been hearing between fifty and eighty judicial review cases per year.[154] Despite this, there remains much uncertainty about the precise scope of the Supreme Court's judicial

[143] Supreme Court Chief Justice Circular Letter 7 of 2014.
[144] Constitutional Court Decisions 108/PUU-XIV/2016, 1/PUU-XV/2017, and 23/PUU-XV/2017.
[145] *Kepaniteraan Mahkamah Agung RI* <https://kepaniteraan.mahkamahagung.go.id/index.php/kegiatan/1410-inilah-putusan-yang-diajukan-peninjauan-kembali-di-tahun-2016>.
[146] For discussion of the hierarchy of laws, see Chapter 2.
[147] Art 20(2), Law 48 of 2009 on Judicial Power.
[148] Art 31(1), Law 5 of 2004 amending 14 of 1985 on the Supreme Court.
[149] Art 31(2), Law 14 of 1985.
[150] Art 31(3), Law 14 of 1985.
[151] Art 9, Supreme Court Regulation 1 of 2004 on Material Review.
[152] Art 31A(2), Supreme Court Law as amended by Law 3 of 2009. The review can be brought as a separate application or as part of a cassation case: Art 31(3), Supreme Court Law as amended by Law 5 of 2004.
[153] Lev (n 50).
[154] Butt and Parsons (n 61); Mahkamah Agung (n 14).

review power and whether it will exercise it in any given case. These issues are discussed in Chapter 3 on decentralization.

Supervising the lower courts

One of the Supreme Court's main responsibilities is supervising the 'technical-legal' competence of lower courts. To this end, it often issues 'instructions', notices, and warnings to them.[155] The Court also commonly issues practice notes (*surat edaran*, literally Circular Letters), which instruct the lower courts to do particular things or handle matters in particular ways. These rules generally deal with court administration and management, and the procedures that should be followed to resolve particular types of cases. However, the functions of practice notes have expanded. Some *surat edaran* now: instruct judges how to decide certain types of cases; overturn or reaffirm Supreme Court jurisprudence on a particular matter; and even create new rules that judges should apply in the cases they hear.[156] Some *surat edaran* have even been issued instructing judges how they should decide the particular case before them.

The Court also exercises its supervisory powers when it investigates allegations of judicial impropriety. It sometimes collaborates with the Judicial Commission to do this. The Judicial Commission is a constitutional organ entrusted with 'protecting and upholding the honour, dignity and behaviour of the judiciary'.[157] It does this primarily by supervising compliance with the Code of Ethics and Guide to Judicial Conduct.[158] On the one hand, the Judicial Commission receives many complaints and is generally enthusiastic about pursuing them. On the other hand, the Supreme Court is highly resistant to outside scrutiny. Too often, its judges see any form of accountability as a form of unjustified interference, reflecting a siege mentality and high sensitivity to criticism that has emerged as the Supreme Court struggles with its post-Soeharto role as an autonomous state institution. So, for example, in 2006, Supreme Court judges brought a successful constitutional challenge to the Judicial Commission exercising its statutory powers to review the performance of judges, particularly by assessing judicial decisions. The Constitutional Court held that while 'reading judicial decisions might … identify a breach of a code of conduct or ethics, [it] might place unjustifiable pressure on judges, thereby breaching judicial independence'.[159] Remarkably, the Supreme Court has even invalidated aspects of the ethics code it jointly composed with the Judicial Commission.[160]

The Supreme Court maintains that when the Judicial Commission assesses the technical competence of Indonesia's judges, it adversely affects judicial independence.[161] To support this stance, the Court points to Article 24(1) of the 1945 Constitution, which guarantees judicial independence and Article 41(2) of the 2009 Judicial Power Law, which states that

[155] Art 38, 1985 Supreme Court Law. [156] Pompe (n 8) 200.

[157] Art 24B, Constitution; Art 40(1), Law 48 of 2009 on Judicial Power; and see generally Law 22 of 2004 on the Judicial Commission. The Commission has seven members, including a chairperson and a vice chairperson, who are selected in accordance with the Commission's own procedures. It also has a general secretariat, led by a secretary general, to provide administrative support to the Commission. Judicial Commission members are appointed by the president with approval from the DPR (Art 27, Law 22 of 2004).

[158] Art 40(2), Law 48 of 2009 on Judicial Power. At time of writing, the Code of Ethics and Guide to Judicial Conduct was contained in Joint Regulation of the Supreme Court and Judicial Commission 02/PB/MA/IX/2012 and 02/PB/P.KY/09/2012.

[159] Decision 005/PUU-IV/2006.

[160] Simon Butt, 'Indonesian Supreme Court Invalidates Its Own Ethics Code', *East Asia Forum* (1 March 2012).

[161] Simon Butt, 'The Constitutional Court's Decision in the Dispute between the Supreme Court and the Judicial Commission: Banishing Judicial Accountability?' in Ross H McLeod and Andrew J MacIntyre (eds), *Indonesia: Democracy and the Promise of Good Governance* (Institute of Southeast Asian Studies 2007).

the Commission's work must not infringe upon judicial freedom to examine and decide cases.[162]

Other functions of the Supreme Court

Article 24A(1) of the Constitution authorizes the Supreme Court to perform other functions allocated to it by statute. These include the following:

- Providing judicial interpretations, considerations, and advice to state and government agencies.[163] The Court can provide these suggestions whether requested or not.[164] It often does so by issuing *fatwa*, borrowing the Islamic legal term for a non-binding ruling.
- Advising the president about clemency and rehabilitation. Article 14 of the Constitution states that the president can grant clemency and rehabilitation 'after considering the view of the Supreme Court'.[165] Although the president need not adopt the Supreme Court's view, he or she is required to at least obtain and consider it. Clemency is discussed further in Chapter 12.
- Regulating matters relevant to the administration of the court system that are not regulated sufficiently by statute.[166] The Court commonly does this by issuing a range of different instruments, including *surat edaran* and chief justice regulations (*Peraturan Ketua Mahkamah Agung,* PerMA).[167]

Enforcement of judicial decisions

Civil cases

Indonesia has two Civil Procedure Codes—the amended *Herziene Indonesisch Reglement* (the HIR, which applies in Java and Madura)[168] and the *Reglement Buitengewesten* (the RBg, which is valid in the rest of Indonesia).[169] Both were enacted in Indonesia before Independence in 1945. Their provisions establish the basis for the enforcement of judicial decisions in civil cases. For convenience, this discussion refers only to the HIR, the provisions of which are largely replicated in the RBg, albeit in different sequence.

District court chairs (*hakim ketua*, chief judges) are ultimately responsible for enforcing decisions in cases that commence in their district courts—that is, not only their own district court decisions but also appeals from their decisions to high courts, and appeals from those high courts to the Supreme Court. The court bailiff helps the chief judge to enforce judicial decisions.[170]

A judicial decision must generally be binding (*mempunyai kekuatan hukum tetap*, literally, 'have permanent legal authority') to be enforced. A decision is binding in two circumstances. The first is where it has been appealed up the judicial hierarchy to the

[162] Any interference with judicial power, unless provided for in the Constitution, is prohibited and subject to criminal penalties: Art 3(2), (3), Law 48 of 2009 on Judicial Power.

[163] Art 22, Law 48 of 2009 on Judicial Power. [164] Art 37, 1985 Supreme Court Law.

[165] See also Art 35, Supreme Court Law. [166] Art 79, Supreme Court Law.

[167] The power of the chief justice to regulate these matters appears to be derived from the 2011 Lawmaking Law and its various predecessors. Art 8(1) refers to the Supreme Court as an institution that issues regulations, and Art 8(2) states that these regulations have binding legal force. Many of these regulations can be accessed on the Court's website: <http://www.mahkamahagung.go.id>.

[168] *Staatsblad* 1941 44. [169] *Staatsblad* 1927 227.

[170] Art 54(2), Law 48 of 2009 on Judicial Power. Similar roles are allocated to bailiffs and chief judges for the enforcement of religious court decisions: Art 95, Law 7 of 1989. Art 103, Law 7 of 1989 states that religious court bailiffs must: carry out orders from the head of the court; convey announcements and reprimands; inform of judicial decisions; confiscate assets as ordered by the head of the court; record confiscation activities; and send an official copy of this record to the parties.

Supreme Court and the Supreme Court has issued a cassation decision. The second is where the time limits have lapsed for appeal to the high court or the Supreme Court.[171] Lodgement of a request for an appeal or cassation will almost always constitute a stay on enforcement.[172]

If a court's decision has achieved binding force but the unsuccessful party does not voluntarily comply, the successful party must apply again to the first instance court for an order compelling the unsuccessful party to comply with the most recent judicial decision concerning the dispute (Articles 195 and 196 of the HIR). The unsuccessful party is then called before the chief judge of that first instance court, who directs that party to comply with the decision within eight days, or a shorter time as determined by the chief judge (Article 196). If the unsuccessful party still does not comply, or does not attend the enforcement hearing despite being validly summonsed, then the court can take action to ensure compliance. For example, it can seize and auction property to finance damages awarded to the successful party; or it can put a monetary value on an act or service that the unsuccessful party refused to carry out (Articles 197, 200(1), and 225(1)).

These provisions give rise to several problems, many of which contribute to long delays in the enforcement of, or eventual non-compliance with, court decisions at every level of Indonesia's judicial hierarchy. The need to obtain a separate order for execution adds, unnecessarily, to the time, complexity and costs of legal proceedings. Worse, the HIR does not require a district court chief judge to respond to a request for an enforcement order immediately—or even within a particular time. As a result, courts often allow such requests to languish deliberately, or through administrative incompetence, causing significant delays in execution. Corruption is also said to significantly affect the enforcement of judicial decisions. We discuss this in Chapter 14.

Administrative cases

Enforcing administrative court decisions presents particular problems. Indonesian government bodies have traditionally been loath to comply with administrative court decisions and have either ignored them or sought to delay enforcement indefinitely.[173] Before 2004, administrative courts could do little to compel government compliance with their decisions. They could merely declare an administrative decision invalid and then hope the decision-maker annulled or replaced it.

However, amendments to the Administrative Court Law enacted in 2004 gave administrative court decisions more teeth, allowing these courts to impose fines and administrative sanctions upon administrative decision-makers who do not comply with administrative court decisions. The amendments also allow the court registrar to publish details of non-compliance in the media.[174]

Nevertheless, the Administrative Court Law still does not facilitate immediate government compliance. If the court orders the government to cancel an administrative decision and the government does not do so, the administrative decision only loses legal force after four months (Article 116(2) of the Administrative Court Law). This, in effect, allows the government to continue using the administrative decision for four months after an administrative court has declared that decision illegal, by which time the interests of the person affected by the decision might be irreparably harmed.

[171] Elucidation to Art 195, HIR.

[172] For exceptions, see Art 180, HIR; and Supreme Court Circular Letters 3 of 2000 on Summary and Provisional Decisions (*Uitvoerbaar bij voorraad*) and 4 of 2001 on Problems of Summary and Provisional Decisions.

[173] Adriaan Bedner, *Administrative Courts in Indonesia: A Socio-Legal Study* (Kluwer Law International 2001).

[174] Art 116(4)–(5), Law 9 of 2004 amending Law 5 of 1986 on the Administrative Courts.

By contrast, the government has three months to comply with an administrative court order requiring it to annul and replace an administrative decision, or make a decision that it was required to make but has not made (Article 116(3)). The result is, again, that the government enjoys a significant 'grace' period during which it can ignore the administrative court decision.

Criminal cases

Public prosecutors are responsible for enforcing criminal decisions.[175] As part of this function, prosecutors arrange and monitor the implementation of criminal punishments, including limited release, parole, and even executions. We discuss the role of prosecutors in Chapters 1, 11, and 12.

As in civil cases, criminal decisions become enforceable once they have permanent legal force (*mempunyai kekuatan hukum tetap*). This phrase is defined in the Elucidation to Article 2(1) of Law 22 of 2002 on Clemency as:

(1) a first instance decision that is not appealed within the time limits stipulated by the Code of Criminal Procedure;

(2) an appeal decision for which cassation is not sought within the time limits stipulated by the Code of Criminal Procedure; or

(3) a cassation decision.

The time limit to appeal first instance decisions is seven days, running from when the decision was issued or from the defendant being informed of the decision if he or she was not present when the decision was read out.[176] The time limit for appealing high court decisions to the Supreme Court is fourteen days after the defendant is informed of the decision.[177]

[175] Art 30(1), 2004 Public Prosecution Law; Art 54(1), Law 48 of 2009 on Judicial Power; Arts 270–83, KUHAP.
[176] Arts 233(2) and 234(1), KUHAP. [177] Arts 245(1) and 246(1), KUHAP.

5

The Constitutional Court

INTRODUCTION

This chapter covers Indonesia's Constitutional Court. All other Indonesian courts are introduced in Chapter 4.

The Constitutional Court is a relatively new institution, established in August 2003, as required by the Fourth Amendment to Indonesia's Constitution, made in 2002. It consists of nine judges, with the Supreme Court, the national legislature (*Dewan Perwakilan Rakyat*, DPR) and the president each choosing three judges to serve on the Court.[1] If a judge leaves the Court, then the nominating institution replaces him or her. Decisions of the Constitutional Court are final and binding as of the time they are pronounced; they are not subject to appeal.[2]

Of all the institutions created by the four constitutional amendments passed between 1999 and 2002, the Constitutional Court has had the most impact on the Indonesian legal system. In fact, litigation in the Court has begun to create the body of sophisticated constitutional jurisprudence that Indonesia has always lacked.[3] There was no room under the authoritarian regimes of Soekarno (from 1957) and Soeharto (1966–98) for judicial review conducted by an independent judiciary. When the New Order finally collapsed amid economic chaos in 1998, the creation of an independent judicial body that could ensure that laws passed by the DPR did not threaten the new democratic political agreement embodied in the amended constitution was therefore seen as essential.

Over the last decade and a half, the Constitutional Court has provided both Indonesia's first public forum for serious debate on the interpretation and application of the constitution, and its first significant and easily accessible body of reasoned decisions about the constitution—and thus Indonesia's new democratic system. The Court quickly developed into Indonesia's most respected court and one of the most successful institutions established during the post-Soeharto Reformation (*Reformasi*) era. Under its first two chief justices, Jimly Asshiddiqie (2003–08) and Mahfud MD (2008–13), the Court built and maintained a deserved reputation for independence from government and for having far greater competence, reliability, and impartiality than other Indonesian courts.[4]

With only a few exceptions, the government has complied with the Court's decisions, even though the Court lacks formal enforcement powers.[5] This is significant in an environment where some politicians remain unaccustomed to having their political powers checked by an external body. Some politicians have been openly hostile towards the Court and would undoubtedly be happy if it was abolished altogether. Indeed, the national legislature has even attempted to reduce its powers and rein in its perceived activism. However, the Court has survived these attempts and has arguably built public popularity by standing up to those who sought to hobble it.

[1] Art 24C(3), Constitution.

[2] Art 10, Law 24 of 2003 on the Constitutional Court; Elucidation to Art 10, Law 8 of 2011.

[3] Simon Butt and Tim Lindsey, *The Indonesian Constitution: A Contextual Analysis* (Hart 2012) 103–04.

[4] With the possible exception of the religious courts, which, as discussed in Chapter 4, are known for being efficient and relatively corruption-free. See Cate Sumner and Tim Lindsey, *Courting Reform: Indonesia's Islamic Courts and Justice for the Poor* (Lowy Institute for International Policy 2010).

[5] For examples of the government defying Constitutional Court decisions, see Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Brill 2015); Butt and Lindsey (n 3).

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However, despite its achievements and relative professionalism, the Court has proved to be far from perfect, particularly in recent years. It has been criticized for less-than-persuasive and sometimes obscure legal reasoning in some decisions, and for its apparent failure to adequately test the veracity of evidence upon which it relies.[6] Worse, its reputation was badly shaken in late 2013, when its third chief justice, Akil Mochtar, was arrested for receiving bribes. In mid-2014 he was convicted and imprisoned for life. The Court came some way towards recovering from this under its fourth and fifth chief justices—Hamdan Zoelva (2013–15) and Arief Hidayat (2015–). However, in 2017, another Constitutional Court judge, Patrialis Akbar, was prosecuted for receiving money to influence a constitutional review case. He was convicted of corruption and sentenced to eight years' jail by the first-instance Jakarta anti-corruption court. Claims that other Constitutional Court judges were involved in this scandal are being investigated by the Corruption Eradication Commission. In 2018, Arief Hidayat was reprimanded by the Court's own Ethics Council after meeting with members of the DPR, apparently to secure his reselection for another term. He refused to stand down from the Court's leadership, despite public outcry and several dozen law professors from across Indonesia signing a petition urging him to do so.

While such scandals are devastating for any judicial institution, they are particularly serious for courts like the Indonesian Constitutional Court that have no enforcement powers and so rely heavily on public popularity and political support. When popularity and support evaporate due to scandal, the authority of the Court faces the same fate. This does not appear to have happened, at least not yet. While some are now sceptical about the Court and its integrity, its popularity remains high, at least if judged by its caseload. As Figure 5.2 demonstrates, this steadily increases from year to year. The continued use of the Court is probably due to the national legislature having a far worse reputation for corruption than the Court, as we show in Chapter 14. The Court's willingness to stand up to the government and entrenched interests in high-profile cases is probably also important. Even so, the longevity and viability of the Court probably depends on it demonstrating it is now clean, and remaining scandal-free for a significant period.

JURISDICTION

The Constitution gives the Court five functions, many of which had not previously been performed by any independent institution in Indonesia. First, it can 'decide upon' (*memutuskan*) the dissolution of political parties. In these cases, the government must convince the Court to disband a political party for having an 'ideology, basis, objective, program or activities' that violate the 1945 Constitution.[7] If the Court accepts the government's arguments, then the government can annul the registration of the party.[8] The Court has not yet been called upon to decide one of these cases.

Second, the Court is to 'provide a decision' (*memberikan putusan*) when the DPR asks it to consider whether the President or Vice-president has engaged in treason or corruption, other serious crimes or misconduct, or otherwise no longer fulfils the constitutional requirements for holding office.[9] The DPR must obtain a decision from the Constitutional

[6] Simon Butt, 'Judicial Review in Indonesia: Between Civil Law and Accountability? A Study of Constitutional Court Decisions 2003–2005' (PhD Dissertation, Law Faculty, Melbourne University 2007); Simon Butt, 'Indonesian Constitutional Court Decisions in Regional Head Electoral Disputes' (Centre for Democratic Institutions, Australian National University 2013).

[7] Art 68, 2003 Constitutional Court Law. Further details can be found in Constitutional Court Regulation 12 of 2008.

[8] Art 73, Law 24 of 2003.

[9] Serious crimes are those that attract a prison sentence of five or more years (Art 1(10), Constitutional Court Regulation 21 of 2009).

Court declaring that the president or vice-president has engaged in such behaviour if it wants to impeach him or her.[10] This function appears directed towards ensuring that an impartial decision-maker protects impeachment from becoming entirely political—by preventing the removal of a president or vice-president unless they have clearly committed a crime. After the politics of impeachment have played out in the DPR, any claims made there about criminal wrongdoing are then tested, as a purely legal matter, by an independent arbiter. The Court had not, at time of writing, exercised this function but it appears to sit uncomfortably alongside the Court's other powers, at least to the extent that it requires the Court to determine criminal culpability. The Constitutional Court is not a criminal court and very few, if any, of its judges have experience running criminal trials, let alone knowledge of Indonesian criminal law or the rules of evidence.[11] We suspect that this will make it difficult for the Court to 'provide a decision' that is purely legal, making it possible that the Court's decision will be perceived as entirely political.

Third, the Court has authority to resolve jurisdictional disputes between state institutions. The Court has heard very few of these disputes.[12] This is probably because the Court can only resolve disputes between institutions established by the Constitution and whose jurisdictions are delineated there. Many very important and common jurisdictional disputes therefore fall outside the Court's remit. For example, perhaps the most controversial and problematical jurisdiction dispute to have emerged in recent years is between the Corruption Eradication Commission, an extra-constitutional agency, and the police, over the right to pursue high-profile corruption investigations.[13] While various Constitutional Court judges have made suggestions in the media about which of the two institutions have jurisdiction over particular cases, the Court itself has no power to determine this issue.

Fourth, the Court resolves electoral disputes. This it has done largely to the apparent satisfaction of contesting parties.[14] As indicated in Figure 5.1, the Court has handled thousands of electoral disputes, including those arising out of elections for the presidency; positions in national, provincial, city and county legislatures; and the DPD (*Dewan Perwakilan Daerah*), Indonesia's national regional representatives assembly. It has also resolved disputes arising out of elections for regional heads (*Pemilukada*) since 2008. It has heard almost a thousand of these disputes, and ordered re-counts or even re-elections in seventy-seven of them.[15]

The Court is particularly busy every five years when simultaneous elections are held to fill national and regional legislatures, the regional representative council and, from 2019, the presidency and vice presidency. Challenges to results must be lodged with the Court within seventy-two hours of the announcement of the election result.[16] If the Court accepts the application, it must issue a decision within fourteen days for presidential elections and within thirty days for legislative and regional representative council elections.[17] Deciding

[10] The intention behind the Court being given this power appears to be to prevent a repeat of the highly politicized process by which President Abdurrahman Wahid ('Gus Dur) was impeached in 2001, during which the absence of an impartial body to oversee the impeachment process was brought into sharp relief: Butt (n 5); Butt and Lindsey (n 3).

[11] Only the Supreme Court has appointed judges to the Constitutional Court who have previously been judges in other courts. However, many of these judges do not have experience in criminal cases, having worked only in the administrative courts.

[12] According to Court statistics, available at <http://www.mahkamahkonstitusi.go.id>, the Court heard only twenty-four such cases between 2004 and 2014.

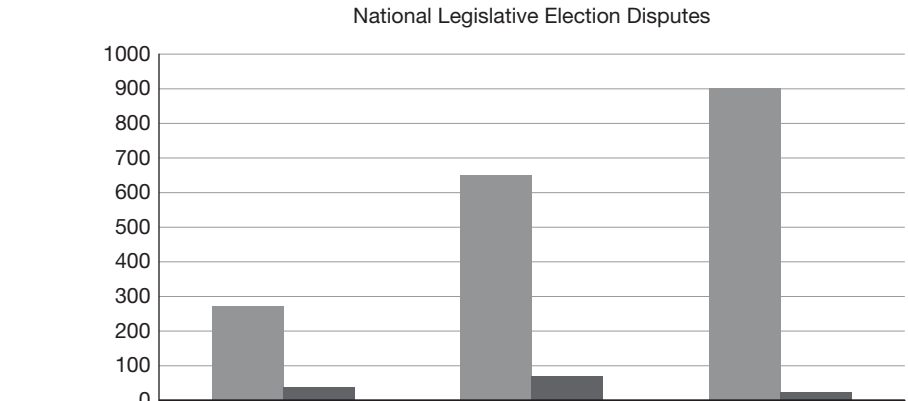
[13] We discuss the highly vexed relationship between the police and the Corruption Eradication Commission in Chapter 14.

[14] Butt (n 5); Simon Butt, 'Indonesian Constitutional Court Decisions in Regional Head Electoral Disputes' (Centre for Democratic Institutions, Australian National University 2013).

[15] See Constitutional Court website: <http://www.mahkamahkonstitusi.go.id/index.php?page=web.RekapPHPUD&menu=5>.

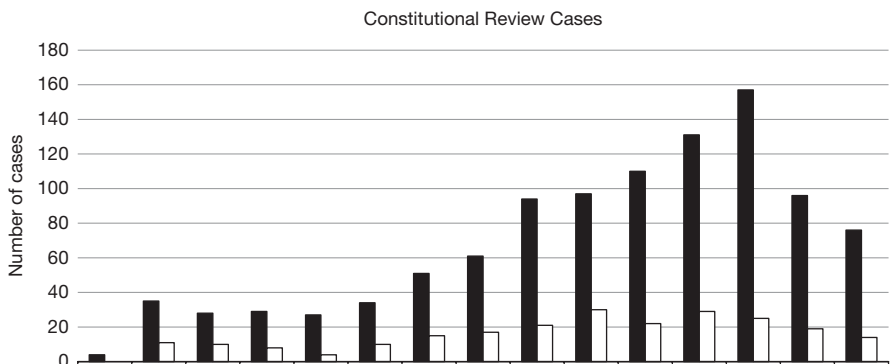
[16] Art 74(3), Law 24 of 2003.

[17] Art 78, Law 24 of 2003.



	2004	2009	2014
Applications	273	650	903
Granted	38	70	23

Figure 5.1 National legislative election disputes



	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Cases	4	35	28	29	27	34	51	61	94	97	110	131	157	96	76
Invalidations	0	11	10	8	4	10	15	17	21	30	22	29	25	19	14

Figure 5.2 Constitutional review cases

cases within these strict timelines is a mammoth task, requiring the Court to split into three panels with three judges each, and often to work late into the night.

The remainder of this chapter focuses on the fifth function of the Court: constitutional review. Using this power, the Court decides challenges brought by citizens and various legal entities to the constitutionality of national legislation. If the Court decides that the statute under review violates the Constitution, the Court can invalidate that statute and declare it no longer binding. As Figure 5.2 indicates, this function comprises a significant proportion of the Court's caseload .

JUDICIAL REVIEW

The Constitution grants the Court a relatively narrow power of judicial review. It is permitted only to review the constitutionality of *undang-undang*, that is, statutes produced by the DPR. The Court has, however, in several decisions held that its constitutional review powers extend to Perpu (also Perppu, *Peraturan Pemerintah Pengganti*

Udang-undang, Regulation in Lieu of Law), or interim emergency statutes issued by the president, on grounds that these are equivalent in effect to statutes.[18] It cannot review the constitutionality of other legal instruments used in Indonesia, including those listed in or referred to in the hierarchy of laws discussed in Chapter 2, even if they are subordinate regulations made pursuant to a statute. The Court has, therefore, thrown out applications in which it has been asked to review MPR[19] decisions and government regulations. The Court's constitutional powers also do not permit it to review the constitutionality of government action.

Despite these limitations, the Court is, in our view, 'activist' by world standards. It has heard hundreds of judicial review applications and has invalidated statutory provisions in many of them. The Court has established comparatively relaxed rules of standing, allowing a large variety of applicants to bring applications before it, whether citizens, groups with shared interests, indigenous communities, public and private legal entities, and state institutions. One of the few categories of applicants that the Court has rejected is foreign citizens, who in a 2007 decision were denied standing by a majority of the Court.[20]

The Court has been called upon to resolve highly charged political matters and has not shied away from them. It has also consistently pushed the boundaries of its jurisdiction. For example, the Court granted to itself power to order re-elections and re-counts in electoral districts where vote buying and other electoral impropriety occurred.[21] The Court often even intrudes on legislative power, as we show below.

The Court has issued many landmark decisions, upholding various democratic, socio-economic, and political rights, and reconfiguring aspects of important state institutions and Indonesia's political and legal system, although we mention only a handful of key decisions here.[22] It has, for example, significantly changed the shape of Indonesia's electoral system. This it has done when applicants—often politicians or political parties—bring constitutional challenges to provisions of Indonesia's various election laws. In one early, famous case, the Court invalidated restrictions on former members of prohibited institutions, including the Indonesian Communist Party, from standing for election.[23] Perhaps its most important jurisprudence was produced in a series of decisions made in the lead-up to the 2009 legislative and presidential elections. In one case, the Court held that citizens whose names did not appear on the electoral roll could vote on election day provided they met various conditions, including producing their identity card at their local polling station.[24] In another, the Court decided that Indonesia's 'semi-open' list system, used in legislative elections, was unconstitutional.[25] Under this system, parties winning sufficient votes to obtain seats could allocate seats to their preferred candidates, even if those preferred candidates had received fewer votes than other candidates from the party. 'In the name of democracy', the Court required that parties allocate their seats to their candidates receiving the most votes.

In other decisions issued around the same time, the Court appears to have sought to prevent the entrenchment of major political parties at the expense of smaller parties and independent candidates. For example, in the *Sisa Suara* case,[26] the Court decided that

[18] Perpu are discussed in detail in Chapter 2.

[19] The MPR (*Majelis Permusyawaratan Rakyat* or People's Consultative Assembly) is, in effect, a joint sitting of the DPR and DPR. For a discussion of its powers, see Chapter 1.

[20] Constitutional Court Decision 2-3/PUU-V/2007.

[21] Butt (n 6); Butt (n 5).

[22] For more detailed discussion of a wider variety of cases, see Butt (n 5); Butt and Lindsey (n 3).

[23] Constitutional Court Decision 011-017/PUU-I/2003.

[24] Constitutional Court Decision 102/PUU-VII/2009.

[25] Constitutional Court Decision 22-24/PUU-VI/2008.

[26] Constitutional Court Decision 110-111-112-113/PUU-VII/2009. Discussion of this case draws on Simon Butt, 'Two at the Top: The Constitutional Court and the Supreme Court' (2009) XI(8) *Van Zorge Report on Indonesia* 12.

once a party had reached the number of votes required to obtain one or more seats, it could not then claim any remaining seats based on its overall proportional share of the votes. The votes that parties had used to obtain seats were, in effect, extinguished. This gave smaller parties a greater opportunity to obtain seats. In another case, the Court decided that candidates wishing to stand for election as a regional head—that is, as governor (in a province), mayor (in a city), and regent (in a county)—could be 'independent'. They did not need to be nominated by a political party, as had previously been required by statute.[27]

The Court also heard several election-related constitutional review cases in the lead-up to the 2014 elections. In one judgment, handed down in early 2014, the Court held that presidential and legislative elections should not be held three months apart.[28] From 2019 legislative and presidential elections will be held together.

More recently, the Court has upheld traditional land rights of indigenous communities over coastal resources and forests. Article 33(3) of the Constitution requires that the state 'control' natural resources for the greatest possible prosperity of the people. Article 18B(2) of the Constitution requires the state to 'respect customary law communities and their traditional rights'. Reading these provisions side by side, the Court has held that the state is subject to Article 18B(2) when it exercises its control over natural resources under Article 33(3) of the Constitution.[29] This means that the state cannot legally award concessions or rights over natural resources if it ignores the rights of recognized customary law communities.[30] The state can hardly be said to be exercising control over natural resources for the greatest prosperity of the people under Article 33(3) if it deprives people of the resources upon which they rely. As we show in Chapter 7, however, there is real doubt about whether this decision will always be followed, given the difficulties customary law communities have long experienced in asserting their rights.

Usurping legislative power? Conditional constitutionality

The Court commonly issues what we describe as conditional decisions. In them, the Court decides that a statutory provision is constitutionally problematic but declines to invalidate it on the condition that it is interpreted or applied in a particular way.

Under the chairpersonship of Professor Asshiddiqie, the Court began issuing what we call 'declarations of conditional constitutionality'. In these decisions, the Court identified a constitutional defect in the statute under review but held that it could remain 'on the books' provided it was interpreted in line with the Court's conditions. The Court would describe these conditions vaguely, perhaps even aspirationally. For example, in an earlier case, the Court upheld the constitutionality of a statute allowing film censorship but said that it needed to be interpreted in line with the 'spirit of the times'—that is, the 'spirit of democracy' and 'respect for human rights'.[31] These conditional constitutionality decisions appeared to indicate that the Court was being deferential to the legislature because, in them, the Court gave the legislature the benefit of the doubt by not invalidating the statute under review.[32] They also did not 'disrupt' the legislature, which was not forced to respond

[27] Constitutional Court Decision 56/PUU-VI/2008.

[28] Constitutional Court Decision 14/PUU-XI/2013. For an analysis of this decision, see Butt (n 5).

[29] Simon Butt, Rosemary Lyster, and Tim Stephens, *Climate Change and Forest Governance Lessons from Indonesia* (Routledge 2015).

[30] Butt, 'Traditional Land Rights before the Indonesian Constitutional Court' (2014) 10(1) *Law Environment and Development Journal* 57.

[31] Constitutional Court Decision 31/PUU-IV/2006.

[32] Simon Butt, 'Indonesia's Constitutional Court—The Conservative Activist or Pragmatic Strategist?' in Björn Dressel (ed), *The Judicialization of Politics in Asia* (Routledge 2012).

to the decision, although those persons to which the statute under review applied had to abide by the Court's conditions.

However, these declarations of conditional constitutionality were problematic. Because the Court did not formally invalidate statutory provisions when it issued these declarations, the provisions remained in force if the Court's conditions were not met. This, in effect, allowed the government to simply ignore the Court's conditions—something the Court could do very little about because, as mentioned, it has no formal powers of enforcement.

In response, the Court, under Chief Justice Mahfud, began declaring statutes conditionally *un*constitutional—that is constitutionally invalid unless the conditions it specified were met.[33] This means that any action taken under a statutory provision the Court has declared conditionally unconstitutional is formally invalid unless the conditions the Court stipulates are met. The government cannot, at least in theory, simply ignore these types of Constitutional Court decisions. This is because any action taken under a statutory provision that has been declared conditionally unconstitutional, and which does not heed the Court's conditions, will therefore lack a statutory basis. Again, because the Court cannot formally enforce its decisions, it can do little if government officials ignore its decisions, though it might issue a press release to 'shame' the government for performing an illegal act or ignoring the Court's decision.

Perhaps even more significant than this presumptive shift has been the greater specificity with which the Court now casts its 'conditions'. This, too, began during Mahfud's term as chief justice. The Court now often sets out its conditions as if they are amendments to the statute under review. A very clear example of this can be found in the *Wedlock* case (2012),[34] which is typical of the Court's approach to conditional unconstitutionality. In it, the Court reviewed Article 43(1) of the Marriage Law, which states 'A child born out of marriage has a civil legal relationship with its mother and her family'. The Court declared Article 43(1) conditionally unconstitutional—that is, unconstitutional unless interpreted to mean:

> A child born out of marriage has a civil legal relationship with its mother and her family, and its father and his family [provided that paternity] can be proven by science and technology and/or another form of legally-recognised evidence that the father has a blood relationship with the child.[35]

On our reading, the Court here appears to be seeking to replace Article 43(1) with its own formulation, which resembles a direct and precise legislative amendment. In particular, the Court has granted rights to children and created obligations for biological fathers.

Given the Court's lack of formal enforcement powers, conditional decisions are probably simply pragmatic responses to the realistic expectation, born from bitter experience, that the legislature will respond to the Court's decisions slowly, if at all. Quite apart from the fact that the DPR has rarely directly responded to Constitutional Court decisions, the DPR sometimes goes for long periods enacting no legislation for various reasons, usually political, as we explain in Chapter 2. In this context, striking down legislation results in a long, perhaps permanent, legal vacuum during which the invalidation might put the applicant in a worse position. Applied to the *Wedlock* case, for example, if the Court struck down Article 43(1) of the Marriage Law and the DPR did not quickly replace it, the result would be that children born out of wedlock might have had no legal basis to claim from anyone, not even their mothers.

The Court has not admitted to creating new law with these types of decisions. It has also not responded to concerns that, through these decisions, the Court intrudes into the

[33] See, in particular, Constitutional Court Decision 54/PUU-VI/2008, para [3.22].
[34] Constitutional Court Decision 46/PUU-VIII/2010.
[35] Constitutional Court Decision 46/PUU-VIII/2010, para [3.13].

legislative domain, perhaps even undermining the separation of powers. Instead, the Court commonly proclaims itself to be a 'negative legislator' (that is, it can only strike down legislation) rather than a 'positive legislator'. In our view, such claims are not credible, given these specific norm reformulations, combined with the Court's increasing use of 'conditional' decisions. For example, under Asshiddiqie, around 35 per cent of successful challenges included declarations of conditional constitutionality. This rose to around 60 per cent under Mahfud.[36]

Conditional decisions have not been well-received by many legislators. In fact, the DPR attempted to prevent the Court from issuing them by amending the 2003 Constitutional Court Law in 2011. However, the Court did not allow these amendments to hinder its decision-making practices, including in these 'conditional' cases, invalidating almost all of them within only a few months of their enactment.[37]

Limitations

While the Court has been pushing the boundaries of its jurisdiction in these conditional decisions, it appears to have unnecessarily restricted itself in other respects. Perhaps most fundamental is that, with few exceptions, the Court gives its decisions only prospective effect. In other words, if the Court decides that a statute breaches the Constitution and declares that statute to be invalid, the statute will only be invalid from the moment the Court finishes reading its decision. Any action taken under the statute between its enactment and its invalidation is not affected by the declaration of invalidity and therefore remains legal.[38] As the Court commonly declares, it is not concerned with concrete cases, but rather with the constitutionality of statutory norms that apply generally to all.

So, for example, in the *Mahendra* case (2010),[39] the Constitutional Court decided that the *Jaksa Agung* (Prosecutor General/Attorney General) had held office unconstitutionally for several months but clarified that its decision would operate only into the future. The Court explicitly declared that acts that he had performed while holding office unconstitutionally, but before the Court's decision, were not thereby rendered invalid or otherwise legally flawed. Instead, the Constitutional Court simply ordered him to step down, effective from the moment the decision was read in open court. The same principle had been applied in the earlier *Bali Bombing* case (2003), in which the Court decided by a bare majority that the statute under which the Bali bombers were convicted and sentenced to death was unconstitutional because it was enacted after the bombings took place. The decision could not, however, be used to undo actions taken under the statute that the Constitutional Court had held unconstitutional. In other words, the Bali bombers did not need to be set free or retried as their conviction under the impugned statute took place before the Constitutional Court had invalidated it. Three of them were duly executed in 2008.

Of course, this approach significantly undermines the utility of bringing an application before the Constitutional Court. Even if the applicant wins, he or she can obtain no redress for damage to constitutional rights already suffered. For most applicants, then, the most they can hope for is a moral victory: applicants can only expect to prevent future constitutional damage to themselves or others by having the Court remove the offending statute from the books.

[36] Butt (n 5). [37] Butt and Lindsey (n 3).

[38] For statements to this effect see, Constitutional Court Decision 3/PUU-VII/2010, reviewing Law 27 of 2007 on the Management of Coastal Areas and Small Islands, para [3.15.13]; and Constitutional Court Decision 36/PUU-X/2012, reviewing Law 22 of 2001 on Oil and Natural Gas, para [3.21].

[39] Constitutional Court Decision 49/PUU-VIII/2010.

Similarly, the Court has also continually refused, with very few exceptions, to review the constitutionality of the way statutes are implemented. According to the Court, its reviews are limited to the words or norms in statutes, rather than how they are interpreted or applied in practice, including through the issuance of implementing regulations. It is for other courts in Indonesia's judicial hierarchy to determine whether the implementation of a statute corresponds with its norms.

This stance does not readily correspond with at least one of the Court's rules on standing—that applicants show actual or anticipated constitutional damage to bring an application before the Court. There seems no reason to require this if the Court's decision will not be ultimately geared towards providing redress for that damage. It also seems incongruent with the Court's conditional decisions, where the Court seeks to dictate how a statute must be 'interpreted' to retain constitutionality or avoid invalidity.

A MODEL FOR REFORM?

Despite the shortcomings we have just described, the Constitutional Court has emerged as a 'model' for Indonesia's other courts, many of which, as shown in Chapter 4, are widely regarded as being dysfunctional. It has, for example, set high transparency standards relative to these other courts, in at least four ways. First, like other Indonesian courts, proceedings are open to the public but, unlike other courts, proceedings are also reliably transcribed and available for viewing on the Court's website. It is, therefore, possible to read the oral arguments presented by the applicants and the Court's responses to them, which sometimes provide more insight than the decision itself.

Second, from its earliest days, the Court has published its decisions online almost immediately after handing them down. While other courts—particularly the religious courts—have now followed suit, publishing many of their decisions on their own websites or the website of the Supreme Court,[40] none are uploaded as quickly as the Constitutional Court's. Arguably, these other courts might not have been pushed to make their decisions available had the Constitutional Court not done so.

Third, within the confines of the judicial decision writing style of the civil law tradition discussed in the previous chapter, the Constitutional Court's decisions are also generally more discursive and better reasoned than those of Indonesia's other courts.[41] In other words, the Constitutional Court generally provides more detail about its decision-making processes and the interpretative method it uses than do other courts. To be sure, the Court's arguments are sometimes poorly expressed, legally questionable, and, at times, confusing, but they nonetheless constitute a significant advance relative to other Indonesian courts.

Finally, judges of the Constitutional Court issue dissenting opinions far more regularly than Indonesia's other courts. However, the precise purpose and significance of dissenting opinions is unclear in Indonesia, including in the Constitutional Court. It might be presumed that they should facilitate greater transparency in judicial decision-making, because they allow the reader to see who disagrees with what, and help judges hold their colleagues accountable for their decisions, perhaps forcing them to better justify their decisions. The Court appears to support this thinking, stating that dissenting opinions that are 'intelligent and enlightening' are crucial pillars of its accountability.[42]

However, in practice, the Constitutional Court rarely uses dissenting opinions for this purpose, with majority and minority decisions rarely referring to each other. The majority

[40] For discussion of publication of judgments by Indonesian courts, see Chapter 4.
[41] Butt (n 6).
[42] 'Ujian Bagi "Sang Penguji"' *Berita Mahkamah Konstitusi* (December 2003).

and minority decisions in any given case will often contain contradictory assertions of fact and argument but will almost never attempt to resolve these diverging views or assert why one position is better or more correct than the other. The Court has not explained its reluctance to include judicial debate in its judgments.

Similarly, questions have been raised about the relative 'weight' of dissenting opinions. For example, does a four-judge dissent have more persuasive force than a single-judge dissent? Do dissenting opinions merely represent a forum in which dissenting judges can highlight their views, or can they assist in the 'development of the law' by being adopted by a majority in the future? Is the strength of a majority judgment diluted by dissenting opinions, and, if so, does a majority decision become less authoritative if more judges dissent? The Court has provided no guidance on these issues.

There is also some confusion about how majority and minority judgments are 'calculated' and the responsibilities of individual judges in the decision-making process, for example, the process by which the Court reached a decision to invalidate provisions of Law 23 of 2014 on Regional Autonomy (as amended by Law 9 of 2015) that allowed governors to invalidate city and county laws that breached higher-level laws, the public interest, or morality[43] was highly suspect, although this went largely unnoticed in Indonesia's legal community.[44] Included on the nine-judge panel hearing the case was Patrialis Akbar, former Minister for Justice and then a Constitutional Court judge. Akbar also participated in a judges' meeting about the case on 20 August 2016. However, by the time the Court met on 2 February 2017 and 30 March 2017 to discuss the case again, he had been suspended from office and was being prosecuted for taking a bribe to fix the outcome of another Constitutional Court case. Yet without him and his vote, the Court was split four judges to four. Whether a judge must be present during hearings, and during all deliberation meetings, to have his or her 'vote' count is not regulated by law.

If this case is anything to go by, then it appears that a judge need not be present at all important events related to proceedings, although in our view this would greatly weaken the authority of the Court's decisions, leaving it open to allegations that decisions do not properly represent the opinions of all the judges or even that they been manipulated. Had the Court considered itself to be 'split' (as we think it should have), the Chief Justice should have the casting vote.[45] Yet, in this case, Chief Justice Arief Hidayat was in the minority.

Soon afterwards, the Court handed down a related decision concerning provincial regulations.[46] The Court followed the earlier case to invalidate provisions of the 2014 Law that allowed the Minister for Home Affairs to invalidate provincial Perda by ministerial decree. Again, the way this case was decided raises significant questions about the Court's operations that have escaped significant scrutiny. This time, Akbar's replacement, Saldi Isra, was not appointed until after the Court had heard the case but the decision states that he participated in the sole judges' deliberation meeting. Again, this raises questions about whether judges must participate in hearings *and* the judicial deliberations where the decision is made if they are to have their vote count. This case seems to confirm that judges need not attend both. If Isra's vote was excluded, then the Court would have been evenly split four judges to four.

[43] 137/PUU-XIII/2015. This case is discussed in Chapter 3.

[44] Simon Butt, 'Constitutional Court Lets Local Governments off the Leash' *Indonesia at Melbourne* (4 July 2017) <http://indonesiaatmelbourne.unimelb.edu.au/constitutional-court-lets-local-governments-off-the-leash/>.

[45] Art 45(8), Law 24 of 2003 as amended by Law 8 of 2011.

[46] 56/PUU-XIV/2016. This case is discussed in Chapter 3.

6

The Legal Profession

INTRODUCTION

Indonesia's legal profession is notable for a paradox. On the one hand, lawyers determined to use the legal system to achieve social justice have always been prominent and influential.[1] Afew have even left their mark on modern Indonesian history as champions of the *Reformasi* (Reformation) movement that emerged in the mid-to-late 1990s, demanding wide-ranging democratic reforms and the resignation of President Soeharto. Many have dedicated great intellectual vigour, courage, determination, and political skill to efforts to rebuild the *negara hukum*, or rule of law, in their country. Indeed, some even kept the *negara hukum* flame alive during Indonesia's darker authoritarian days by sharing ideas about democracy and human rights, often risking military threats, violence and imprisonment. This is particularly true of the cause lawyers associated with Indonesia's first legal aid non-government organization (NGO), the Legal Aid Institute (Lembaga Bantuan Hukum, LBH), famously established in the 1970s by one of Indonesia's best-known advocates, Adnan Buyung Nasution.[2] It has been true also of a range of other law reform NGOs that were formed soon after the New Order ended in 1998.[3]

On the other hand, the private legal profession in Indonesia has been notable for its internal divisions, combativeness, intense factional rivalries, and disunity. In their struggles for power within their profession, Indonesian lawyers—including cause lawyers associated with legal NGOs—have drawn on the same array of skills they use in their legal practice, often with devastating effect. This has been particularly apparent in the repeated failure of efforts to establish a single, overarching professional organization for Indonesian lawyers, even though such an organization would almost undoubtedly help to improve the professionalism of lawyers. The result is a large, vigorous, and often deeply divided legal profession that lacks a unifying bar association. The differences between factions within the legal profession are heated, laden with ideology, and often become matters of national controversy. This 'battle of the lawyers'[4] hampers the development of the profession, by making it difficult, if not impossible, to maintain Indonesia-wide standards, deliver high-quality legal education, and effectively punish errant lawyers. The constant infighting also breeds public distrust of the profession and, ultimately, keeps lawyers from effectively supporting law reform initiatives.[5]

STRUCTURE OF THE LEGAL PROFESSION

Prior to reforms introduced in 2003, lawyers were divided into several categories including: advocates, who acted as generalist lawyers; legal advisers, who specialized in commercial law; and legal consultants. Different laws and regulations applied to each

[1] For one account of such a lawyer, see Daniel S Lev, *No Concessions: The Life of Yap Thiam Hien* (University of Washington Press 2015).

[2] Daniel S Lev, *Legal Aid in Indonesia* (Centre of Southeast Asian Studies, Monash University 1987).

[3] This introductory section, and the discussion below about rival bar associations, draws on Tim Lindsey and Melissa Crouch, 'Indonesia Cause Lawyers: A House Divided' (2014) 31(3) *Wisconsin International Law Journal* 619.

[4] This is Lev's term for the continued tensions within the profession: Daniel S Lev, *Legal Evolution and Political Authority in Indonesia: Selected Essays* (Kluwer Law International 2000) 319.

[5] See generally Edward Aspinall, *Opposing Suharto: Compromise, Resistance, and Regime Change in Indonesia* (Stanford University Press 2005).

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professional group. Following the promulgation of Law 18 of 2003 on Advocates, all practising qualified lawyers are now referred to as 'advocates'. The Advocates Law governs their legal practices, and they are bound by codes of conduct issued by the bar association (*organisasi advokat*) to which they belong.

The Indonesian legal profession also includes notaries. The legal services they provide are largely administrative and documentary, such as conveyancing and the formalization of legal documents, such as contracts, deeds, articles of association, and the like. Notaries prepare documents that might be used as evidence in litigation but do not represent clients in court and are not advocates. Their activities are regulated by Law 30 of 2004 on Notaries and a Code of Conduct.

The minister responsible for overseeing both advocates and notaries is the Minister of Law and Human Rights.[6] This ministry also oversees foreign lawyers.

In this chapter, we discuss the laws under which advocates and notaries operate and some of the problems those laws raise, and explain the role of legal aid lawyers and paralegals. We also consider why Indonesia's lawyers have been unable to establish an effective unified bar association. The chapter concludes by outlining the rules that apply to foreign lawyers in Indonesia.

ADVOCATES

Article 1(1) of the Law on Advocates defines an 'advocate' as a person whose profession is to provide legal services, whether in or out of court, and who has fulfilled the requirements set out under the Law, described below. Article 5 adds that qualified advocates can practise Indonesian law anywhere in Indonesia. The elucidation to Article 5 states that lawyers are to be independent and free from pressure, threats, interference, fear, and actions intended to undermine their professional dignity.

An advocates' monopoly?

Paralegals who lack formal legal training and admission to the profession have long played an important role in Indonesia's legal system. Their role resembles a 'bare foot doctor' in the medical profession, and they have been called *pokrol bambu* or 'bush lawyers'.[7] They have traditionally performed a critical legal function, providing legal advice to those who could not otherwise afford it and handling day-to-day cases in rural, marginalized, and remote areas.

Article 31 of the Advocates Law originally prohibited those not formally qualified as an advocate—including these paralegals and those working in university legal clinics—from working as, or professing to be, an advocate, and imposed criminal sanctions for doing so. When first enacted, this Law sent shockwaves through Indonesia's community advocate sector, whose members feared no longer being able to provide these legal services. In 2004, lecturers from three university law schools in East Java brought a challenge to Article 31 in the Constitutional Court. Article 31, they claimed, barred campus legal clinics and legal aid departments from providing advocacy services, legal education, and general legal advice for their local community. In practice, 'campus lawyers' provide services like those provided by advocates but many of them are law students and law lecturers who have not been admitted as advocates. The lecturers claimed that Article 31 violated their constitutional right to work, limited the community's access to justice, and prevented universities from fulfilling their statutory obligation to provide community service.

[6] Arts 25(2) and 35, Presidential Regulation 9 of 2005.

[7] Daniel S Lev, 'Between State and Society: Professional Lawyers and Reform in Indonesia' in Timothy Lindsey (ed), *Indonesia: Law and Society* (1st edn, Federation Press 1999) 48–49.

The Constitutional Court agreed that Article 31 limited access to justice, and struck down the requirement that only advocates could provide legal services. The Court reasoned that there were very few practising lawyers to serve a very large general public, particularly in rural areas, who required their assistance.[8] It also found that Article 31 limited access to justice for those who could not afford the services of a qualified advocate. The provision, the court ruled, was intended to protect society from fraud committed by unqualified persons professing to be advocates but the urgent need for community legal services outweighed this.

Because of this decision, lawyers without advocate licences can provide legal services anywhere in Indonesia to help provide community access to justice. While still not formally permitted to appear in court, they sometimes do, as discussed below.

Accredited legal aid lawyers

In its 2004 decision on the Advocates Law, the Constitutional Court went beyond finding that Article 31 impeded access to justice for poor citizens living in rural areas, declaring that:

> **the right to legal assistance**, as a part of human rights, **must be considered a constitutional right of citizens, even though the Constitution does not explicitly regulate or mention it**. The state must, therefore, guarantee the fulfilment [of this right] (*Advocates' Law* case (2004), p 29, our emphasis).

Even though the Court appeared to discover a constitutional right to legal aid, at least for indigent citizens, significant legal debate emerged about whether the Court *established* this right, or merely encouraged the government to provide it.[9] Several years later, the government, supported by civil society and NGOs including LBH, enacted Law 16 of 2011 on Legal Aid (*Bantuan Hukum*). Article 8 of this Law allows legal aid institutions to provide legal assistance to the community, including through persons who are not advocates, provided that the institution is accredited by the Minister of Law and Human Rights. Accredited institutions can employ law lecturers, law students, and other paralegals to assist 'legal aid recipients' (*penerima bantuan hukum*). Government Regulation 42 of 2013 on Requirements and Procedures for Legal Aid Assistance and Legal Aid Budget Distribution, introduced to implement the Legal Aid Law, allows these lawyers to assist in non-litigation matters such as advocacy, legal consultation, negotiation, and other out-of-court assistance (Article 16). To be involved in litigation, unqualified paralegals require supervision from a qualified advocate, and must satisfy several other administrative requirements (Article 13). Despite this, courts often tolerate paralegals acting on their own, usually in minor cases and in remote areas.

The Legal Aid Law and the state-funded legal aid system it introduced are discussed further in Chapter 12 on criminal procedure law.

Labour unions and business owner organizations

The 2004 Industrial Relations Disputes Law allows labour unions (*serikat pekerja/serikat buruh)* and business owners' organizations to represent their members in the Industrial Relations Court (Article 87).[10] It does, not, however, expressly exempt them from the requirement of representation by an advocate or exclude the operation of the Advocates Law. In practice, however, labour unions are sometimes represented by—members who are not advocates—and

[8] Constitutional Court Decision 006/PUU-II/2004.

[9] Simon Butt, 'Judicial Review in Indonesia: Between Civil Law and Accountability? A Study of Constitutional Court Decisions 2003–2005' (PhD Dissertation, Law Faculty, Melbourne University 2007).

[10] The industrial relations court is discussed in Chapter 17.

occasionally by members without prior legal experience. Some judges of the industrial relations court have not objected to this, emphasizing that unions should have a voice in industrial disputes. Likewise, the Indonesian Advocates Association (*Perhimpunan Advokat Indonesia*, PERADI), Indonesia's leading bar association (discussed below), which initially opposed this practice, has now become more tolerant of it.[11]

Admission to practice

Under the Advocates Law, to be admitted as an advocate in Indonesia, a person must:

- be admitted into the profession by the bar association, which must send a declaration of admission to the Supreme Court and the Ministry of Law and Human Rights (Article 2(2) and (3));
- hold a law degree (Articles 2(1) and 3(1)(e)), obtained from a faculty of law, a faculty of Shari'a, an academy of military law or the police academy (elucidation to Article 2(1));
- participate in professional advocates' education (Article 2(1));
- have Indonesian citizenship (Article 3(1)(a));
- reside in Indonesia at time of admission (Article 3(1)(b) and its elucidation);
- not work as a civil servant or state official (Article 3(1)(c));
- be at least twenty-five years old (Article 3(1)(d));
- have conducted an apprenticeship of at least two continuous years in an advocate's office (Article 3(1)(g));
- never have been convicted of a criminal offence that carries a sentence of five years or more (Article 3(1)(h)); and
- demonstrate good behaviour, honesty, responsibility, fairness, and strong integrity (Article 3(1)(i)).

Candidates must also pass a bar association examination (Article 3(1)(f)). PERADI conducts one exam each year. In 2013, 5,742 law graduates sat the PERADI examination, 2,776 of whom lived in Jakarta.[12] Of these, 1,801 (31 per cent) passed. There were 4,764 candidates in 2016 and 5,058 in 2017.[13] As discussed below, the chief rival bar association, the Indonesian Advocates Congress (*Kongres Advokat Indonesia*, KAI), conducts its own bar examinations. Because the status of the KAI exam is uncertain, many KAI members also sit the PERADI exam.

Once these requirements are satisfied, applicants are eligible to swear the professional oath[14] set out in Article 4(2) of the Advocates Law before the High Court in the province in which they are domiciled, and then be admitted as an advocate (Article 4(1)).

In practice, these requirements are not always strictly applied. For example, high courts often do not require much proof of an applicant's suitability for admission before allowing applicants to swear the oath. For instance, the High Court of Jakarta generally only requires a no-dispute clearance letter (*surat keterangan bebas perkara*) from the

[11] Indeed, Harry Ponto, a former Secretary General of PERADI, has even offered legal training for labour union members: 'Bukan Advokat? Tidak Masalah!' *Hukumonline* (9 May 2008).

[12] 'Ujian Advokat Peradi 2013 Diikuti 5,652 Peserta' Hukumonline (23 March 2013).

[13] 'Ujian Advokat di Awal 2017, Jumlah Peserta Meningkat' Hukumonline (11 February 2017) <http://www.hukumonline.com/berita/baca/lt589ecd9f0a208/ujian-advokat-di-awal-2017--jumlah-peserta-meningkat>.

[14] Art 4(2) provides that the oath should take the following form: 'I will uphold Pancasila; have not used untoward means to enter the profession; will act honestly, fairly and responsibly based on the law and justice; will never provide or promise something to a judge, clerk or other official in exchange for a favour for a client; will ensure my behaviour respectful, honourable and responsible; and will not refuse to defend or provide legal services for a case … '

district court of the applicant's region of domicile, stating that the applicant is not being pursued in serious civil or criminal proceedings. District courts will usually issue such letters if the local police provide a 'good standing letter' (*surat keterangan berkelakuan baik*), which can be corruptly obtained with relative ease. This process never picks up criminal charges or prosecutions in a part of Indonesia outside the applicant's region of domicile.

Bar associations

As mentioned, passing a bar exam held by a bar association or 'advocate organisation' is a prerequisite for admission (Article 3(f) of the Advocates Law). This makes admission highly problematic because, as mentioned, Indonesia has several bar associations that are fierce rivals and compete for legitimacy: PERADI, KAI, and the Indonesian Advocates Union (*Persatuan Advokat Indonesia*, PERADIN). Significant internal tensions within these organizations—especially PERADI—further divide the profession.

These divisions within the profession are possible because Article 28(1) of the Advocates Law grants 'the advocate organisation' a monopoly over the running of the profession but does not identify this organization. It simply states that the bar association is a single independent professional advocate forum established to increase the quality of the profession. When the Law was drafted, several bar associations already existed, including the Indonesian Advocates Society (*Ikatan Advokat Indonesia*, IKADIN), the Indonesian Advocates Association (*Asosiasi Advokat Indonesia*, AAI), the Indonesian Legal Advisers Association (*Ikatan Penasehat Hukum Indonesia*, IPHI), the Indonesian Lawyers and Advocates Association (*Himpunan Advokat dan Pengacara Indonesia*, HAPI), the Indonesian Lawyers Union (*Serikat Pengacara Indonesia*, SPI), the Indonesian Legal Consultants Association (*Asosiasi Konsultan Hukum Indonesia*, AKHI), and the Association of Capital Market Legal Consultants (*Himpunan Konsultan Hukum Pasar Modal*, HKHPM). Concern that disagreement between them would prevent their amalgamation as a single organization was voiced repeatedly when the Advocates Law was being drafted in the national legislature, the DPR (*Dewan Perwakilan Rakyat*, People's Representative Assembly).[15] The government, however, expected that that organizations could and would unify, giving them a two-year grace period to achieve that.[16]

These pre-existing associations did, in fact, amalgamate on 8 September 2005,[17] as PERADI. This was the result of a complex negotiation process led by an Indonesian Advocates Working Committee with members of all these associations. However, these negotiations were rushed to meet the two-year deadline and it is now clear that this was insufficient time to build consensus among the pre-existing associations about the legitimacy of PERADI. Its claim to be the nation's sole bar association was, therefore, contested from the outset.

Allegations of corruption within the organization soon emerged,[18] and found support among a group of highly regarded and influential lawyers, many of whom were previously senior figures at LBH. Some of them suspected—rightly or wrongly—that PERADI had somehow already been suborned by either the state or private interests. As a result, many cause lawyers withdrew support from PERADI, and applications were made to the

[15] Indonesia, *Proses Pembahasan Undang-Undang Advokat di Parlemen* (Yayasan Pancur Siwah 2003) 68, 73.

[16] ibid 105.

[17] Notarial Deed 30 dated 8 September 2005 made before Notary Buntario Tigris Darmawan Ng: Deed of Establishment of *Perhimpunan Advokat Indonesia*.

[18] Melissa Crouch, 'Cause Lawyers, the Legal Profession and the Courts in Indonesia: The Bar Association Controversy' [2011] *LAWASIA* Journal 63.

Constitutional Court seeking partial revocation of the Advocates Law to dissolve PERADI. In 2006, however, the Court declined to do this.[19]

Ultimately, in 2008, about 5,000 lawyers surrendered their PERADI membership to establish a rival bar association: the Indonesia Advocates Congress (*Kongres Advokat Indonesia*, KAI).[20] They justified KAI's establishment by claiming that PERADI had not been validly established and did not, therefore, legally exist.[21] KAI quickly assumed functions that, under the Advocates Law, were the prerogative of the official bar association. These included holding bar exams and issuing membership cards that KAI insisted had the same legitimacy as those issued by PERADI.[22]

In response to KAI's establishment, the Supreme Court issued Fatwa 52/KMA/V/2009 in May 2009. In this legal opinion, the Court declared that PERADI's split was an internal matter for advocates. It instructed high court judges to not intervene in, recognize or not recognize, any bar association; or swear-in any new advocates. The Supreme Court asserted that this would violate Article 28 of the Advocates Law.

This Fatwa caused at least three problems. First, new law graduates could not be sworn in and some courts even concluded that the Fatwa prevented them deciding whether any person—even a qualified and admitted advocate—could appear before them. Second, by obstructing the swearing-in of new graduates, the Fatwa exacerbated the existing shortage of lawyers, which is particularly severe outside Java. Third, only the single advocate organization established under the Advocates Law can legally conduct the bar exam but, because both PERADI and KAI claimed to be that organization, each conducted its own exam.[23] The Fatwa did nothing to change this and instead created even more confusion for law graduates hoping to be admitted as advocates.

In December 2009, a group of law graduates, including Abraham Amos, applied to the Constitutional Court for review of Article 4(i) of the Advocates Law. They claimed that this provision and the Supreme Court Fatwa's interpretation of it, violated their constitutional right to work. The Court agreed, holding that Article 4(i) was 'conditionally unconstitutional'.[24] It would be constitutional only if the phrase '[sworn] in an open proceeding of the high court where he or she is domiciled' was interpreted to require the high court to 'swear-in advocates … irrespective of their advocate organisation.' The Court urged PERADI and KAI to unite, observing that neither had been accepted as the sole umbrella organization for lawyers.[25]

This ruling was not applied consistently, leaving the situation confused until the Supreme Court acknowledged PERADI as the main bar association in 2010. The Court also outlined a process for PERADI and KAI to reconcile and establish a single bar association within two years.[26] This solution was rejected by a faction within KAI that claimed that the accord was not legitimate.[27] The Supreme Court responded by asserting that, because KAI had acknowledged PERADI as the sole advocates' organization in the brokered settlement, and PERADI had, in turn, agreed to accept KAI's members, PERADI was the only legitimate bar association.[28] The Supreme Court and the lower courts therefore resolved to swear-in applicants from PERADI and to reject applicants from other associations.[29]

[19] Constitutional Court Decision 014/PUU-IV/2006.

[20] 'Indra Sahnun Lubis Terpilih Jadi Presiden Kongres Advokat Indonesia' *Tempo* (30 May 2008).

[21] ibid.

[22] KAI's rules and conditions of membership can be found on its website: <http://www.kongres-advokat-indonesia.org/index.php>.

[23] Interestingly, anecdotal accounts suggest that the courses and exams provided by the two bar associations are very similar.

[24] Constitutional Court Decision 101/PUU-VII/2009.

[25] Crouch (n 18) 82.

[26] See Supreme Court Circular Letter No 089/KMA/VI/2010 of 25 June 2010.

[27] Setya Adil, 'Lawyers Vandalize Court Over Recognition of Rivals' *Jakarta Globe* (15 July 2010).

[28] Memorandum of Understanding PERADI-KAI; Supreme Court Letter 099/KMA/VII/2010 of 21 July 2010 on the Advocate Organisation.

[29] Supreme Court Circular Letter No 089/KMA/VI/2010 of 25th of June 2010 on Advocate Swearing-In.

In 2011, the Supreme Court seemed to modify—or even contradict—this position, declaring in a practice note that PERADI's status as the principal bar association did not preclude members of other associations being eligible to take an oath and be admitted to practice.[30] Some courts then began recognizing KAI advocates, while others only accepted PERADI applicants. PERADI began conducting special examinations for KAI members who could not practise because they had only sat the KAI examination.

This continuing chaos prompted Amos and his colleagues to file another constitutional challenge to Article 4(1) of the Advocates Law in 2015. The Constitutional Court reaffirmed its 2009 decision, insisting that applicants from all existing bar associations could be sworn in.[31] Since this ruling, many high courts in Indonesia have routinely sworn-in advocates from all bar associations, although some inconsistency and uncertainty remains.

In 2013, the Legislative Committee of the DPR began work to amend the Advocates Law, focusing on the organization of the legal profession. PERADI—which claimed 24,000 members in 2011—submitted that any revision should specifically identify it as the sole advocates' organization.[32] However, KAI—which claimed 17,000 members in the same year—demanded that the single association requirement be removed and that both PERADI and KAI be listed as legitimate bar associations.[33] Articles 15 and 16 of the latest draft of the proposed amended Advocates Law formally recognize multiple bar associations but the Bill is yet to be debated by the DPR.[34] Whatever the outcome, many commentators hope that a new statute will end the seemingly endless feuding[35] described above, and that a unified legal profession will emerge for the first time in Indonesian history.

Rights and duties of advocates

The Advocates Law and the Advocates' Code of Conduct regulate advocates' professional conduct. The Advocates Law establishes broad principles covering the status, rights and obligations of advocates.

Rights

Advocates are to be independent (Article 5(1) of the Advocates Law). They are free to voice opinions or make statements, and to carry out their duties, when pursuing a case before any court. They must, however, adhere to the professional Code of Conduct and prevailing laws and regulations (Articles 14 and 15).

Advocates cannot be sued or prosecuted in a civil or criminal court for anything they do in good faith when performing their professional duties in the interests of a client in a court hearing (Article 16). In performing their professional duties, advocates may obtain information, data and documents necessary for pursuing a client's interests from government agencies or institutions, or other parties (Article 17).

[30] Supreme Court Practice Note 052/KMA/HK.01/III/2011.

[31] Constitutional Court Decisions 112/PUU-XII/2014 and 36/PUU-XIII/2015.

[32] Lita P Siregar and Novrieza Rami, 'Masukan PERADI Untuk RUU Advokat' *Hukumonline* (11 February 2013).

[33] There are no reliable figures on the total number of advocates in Indonesia. PERADI and KAI's claims are not a useful guide, as some advocates are listed as members of both organizations. A commonly heard estimate is around 30,000, which, if correct, is far too few for a population approaching 270 million people. See Indah Wulandari, 'Satgas Mafia Hukum Tak Diperlukan Jika Hukum Membela Kepentingan Publik' *Republika* (3 August 2010).

[34] See draft at: <http://peradin.id/dokumen/ruu-advokat-diajukan-ke-komisi3-dpr.pdf>.

[35] Rofiq Hidayat and Abdul Rasak Asri, 'Revisi UU Advokat Diharapkan Jadi Solusi Perpecahan' *Hukumonline* (10 December 2012).

Advocates are generally entitled to have the confidentiality of their relationship with a client respected. Accordingly, the Advocates Law prohibits the seizure or inspection of case files and documents, and electronic monitoring of communication devices used by advocates (Article 19(2)). Article 47(2) of Law 30 of 2002 on the Corruption Eradication Commission (KPK) provides an exception to this confidentiality right. It allows KPK investigators to seize documents or other evidence for an investigation for which 'sufficient initial evidence' has already been obtained. The KPK has used this provison to access confidential material held by advocates.

Duties

When performing their duties, advocates must not discriminate against their clients based on gender, religion, politics, descent, race, or socio-cultural background (Article 18).

Advocates must maintain the confidentiality of all information obtained from their clients, unless otherwise stipulated in legislation (Article 19(1)). Advocates must not hold other positions that could create a conflict of interest with their professional duties, cause dishonour to the profession (Article 20(1)), or otherwise hinder their independence and freedom when performing their professional duties as advocates (Article 20(2)). Advocates are not permitted to practise while working as a state official (Article 20(3)).

Code of Conduct

The Advocates Law requires the bar association to monitor the legal profession (Article 12(1)) to ensure compliance by its members with relevant regulations and the professional Code of Conduct (Articles 12(2) and 29(1)). To this end, the bar association must establish ethics committees at both the national and regional levels (Article 27(1)) to oversee professional conduct. Regional ethics committees hear cases of professional misconduct in the first instance, while the central ethics committee hears appeals and issues final decisions (Article 27(2)).

The Advocates Law's references to a code of conduct are to the Code approved in 2002 by the seven predecessors of PERADI—IKADIN, AAI, IPHI, HAPI, SPI, AKHI, and HKHPM—and adopted by PERADI upon its formation (Article 33). This Code remains in force. KAI, however, uses its own Code of Conduct, which it produced in 2008.[36] The provisions of the two Codes, especially those pertaining to ethical conduct, are almost identical.[37] The other bar associations have either not submitted codes of conduct or have simply adopted the PERADI Code, except for HKHPM, which has produced a set of professional standards.[38] There is thus broad acceptance of coherent ethical principles among most Indonesian advocates, whatever their other differences. This, of course, does not mean these principles are routinely respected.

The PERADI Code of Conduct regulates various aspects of the professional conduct of advocates including: the client-lawyer relationship (Section III of the Code); relations between professional colleagues (Section IV); and appropriate case management and communications, including restrictions on communicating directly with judges and treatment of without prejudice correspondence (Section VI).

Article 10 of the Code governs the establishment of central and district ethics committees to examine and decide cases of alleged violations.

[36] Kongres Advokat Indonesia Decision (KAI) 08/KAI-I/V/2008 of 30 May 2008 on a Code of Conduct for Indonesian Advocates.

[37] One of the few differences is that the KAI Code includes a Supervisory Commission attached to KAI headquarters, which supervises its members.

[38] See HKHPM website: <http://hkhpm.com/wp-content/uploads/2017/05/standar_profesi2012.pdf>.

Complaints

Under Article 11(1) of the Code, clients, colleagues, the bar association, government officials, and community members can complain about professional misconduct by an advocate if they believe they have suffered loss from it. Members of the bar association to which the accused advocate belongs can complain about an advocate's conduct in the interests of the public or the profession (Article 11(2)). Complaints are lodged with the ethics committee at the bar association branch where the accused advocate is a member (Article 12(1)).

Under Article 6 of the Advocates Law, an advocate can face sanctions for ignoring or neglecting a client's interests; acting inappropriately towards colleagues; discrediting the law or the courts; contravening professional obligations; bringing the profession into disrepute; violating the law; engaging in reprehensible conduct; or ignoring the professional oath or Code of Conduct.

The bar association can impose sanctions, including oral or written admonishment; suspension from practice for three to twelve months; and disbarment (Article 7(1) of the Advocates Law). When imposing them, the association should consider Article 16(2) of the Code, which sets guidelines for administering sanctions. Article 8(2) of the Advocates Law requires the bar association to advise the Supreme Court if it suspends or disbars an advocate. Any professional sanction does not affect any criminal liability associated with the violation (Article 26(6) of the Advocates Law).

Fees and pro bono work

An advocate may charge an honorarium for legal services provided to a client, as agreed between them (Article 21 of the Advocates Law). Advocates must, however, consider the financial position of their clients when setting their fees (Article 4(d) of the Code of Conduct).

Advocates must provide pro bono legal assistance to clients otherwise unable to afford such services (Articles 1(9) and 22(1) of the Advocates Law; Article 7(h) of the Code of Conduct) or lacking 'economic means to otherwise obtain access to justice' (Article 2 of Government Regulation 83 of 2008 on Requirements and Procedures for the Provision of Free Legal Aid). Article 11 of PERADI Rule 1 of 2010 sets out detailed procedures on pro bono assistance, and recommends that advocates undertake at least fifty hours of pro bono work every year. This can include both in- and out-of-court work, at any level of the justice process (Article 3 of Government Regulation 83 of 2008). Advocates must provide the same standard of professional services for pro bono work as they would for any other type of work (Article 4(f) of the Code of Conduct). Advocates must not simply reject requests for legal assistance (Article 12(1) of Government Regulation 83 of 2008) and those whose requests are rejected can complain to the bar association (Article 12(2) of Government Regulation 83 of 2008). Advocates must report their pro bono work to the bar association (Article 17 of Government Regulation 83 of 2008; Supreme Court Circular Letter 10 of 2010 on Guidelines for the Provision of Legal Aid).

In 2012, the American Bar Association[39] praised Indonesia's laws dealing with pro bono legal services, but reported that few lawyers fulfil their pro bono obligations and even fewer are pursued for breaching them. In 2011, PERADI revealed that only a few hundred of its tens of thousands of members had reported providing any pro bono legal assistance.[40] PERADI has discussed increasing the recommended minimum to 150 hours and making the fulfilment of pro bono obligations a prerequisite for obtaining or renewing PERADI membership.[41]

[39] American Bar Association, *Access to Justice: Assessment for Indonesia, South Sulawesi Province* (American Bar Association 2012).

[40] 'Bantuan Hukum Diusulkan Masuk Kurikulum PKPA' *Hukumonline* (26 May 2011).

[41] ibid.

NOTARIES

As mentioned, Law 30 of 2004 on Notaries regulates the work of notaries.[42] These are semi-public officials who do not represent particular parties; rather, they mainly draft or formalize documents and then archive them at their offices. They ensure that important legal documents comply with legal formalities so they are 'valid' and can be relied upon in Indonesian courts. By doing so, notaries perform a significant portion of legal work in Indonesia.

The bulk of the work of Indonesian notaries is, in fact, preparing and formalizing notarized deeds, also called authentic deeds (*akta otentik*). Some Indonesian notaries are also Land Conveyance Officials (*Pejabat Pembuat Akta Tanah*). They help to establish good title to land for real property transactions.

Due to a quota system administered by the Ministry of Law and Human Rights, Indonesian notaries have little competition for their services, which for many Indonesians are prohibitively expensive. The absence of competition is also thought to encourage low competence levels and even corruption. Many view the notarial monopoly on preparing essential legal documents as unfair and unnecessary, particularly in areas such as company, family, and property law.[43]

Appointment

To become a notary, an applicant must:

- hold Indonesian citizenship;
- believe in God;
- be at least twenty-seven years of age;
- have good physical and mental health, as stated in a certificate of good health by a doctor and psychologist;
- have a law degree and a level two diploma in notarial work;
- have undertaken at least twenty-four continuous months of apprenticeship or worked in a notary's office;
- not hold a position as a civil servant, state official, lawyer, or any other position prohibited for notaries; and
- not have been convicted of an offence that carries a punishment of five or more years in prison (Article 3 of the Notaries Law).

Rights and obligations

Notaries are authorized to produce authentic deeds concerning conduct, contracts, and other matters that must, by law, be expressed in the form of an authentic notarial act. Only notaries can perform this authentication, unless specifically permitted in legislation (Article 15(1)) of the Notaries Law. Notaries can also authenticate signatures and dates in special registers; keep records of contracts that are not deeds; authenticate photocopies; and provide conveyancing services and legal briefings about deed creation (Article 15(2)). In addition to general professional obligations of honesty, impartiality,

[42] The 2004 Law was amended by Law 2 of 2014.

[43] ASEAN, 'The Legal Profession and Education', *Legal Systems in Asia: Indonesia* (ASEAN 2005) 119 <https://www.aseanlawassociation.org/legal-indonesia.html>.

independence, and confidentiality, notaries are subject to many specific and very detailed obligations about how they administer and store legal documents (see Article 16 of the Notaries Law).

Language of deeds

Article 43(1) of the Notaries Law requires that notarial deeds be in the Indonesian language (*Bahasa Indonesia*), the national language. The Law is silent on the consequences of non-compliance, but under the Civil Code a deed that does not fulfil the criteria for a valid notarial deed will be deemed a mere 'deed under hand' (*akta bawah tangan*). The authenticity and substance of such a deed may be challenged, very signficantly weakening its evidentiary weight in litigation.[44] A compliant notarial deed (*akta otentik*), by contrast, constitutes absolute proof, and binds the parties unless fraud can be proven in relation to its formation.[45]

Article 43(1) is problematic because of growing demand for cross-border deals involving Indonesian parties or assets in Indonesia. The documents governing such deals often involve an English-language version, because foreign laws may apply (this is permitted in Indonesian contract law)[46] or simply to facilitate ease of understanding between local and foreign parties. There are, however, often significant gaps in meaning between the English and Indonesian versions of such deeds, sometimes the result of conceptual differences between the British common law tradition and European civil law systems.

In an effort to clarify the situation, Article 43(3)–(6) were inserted into the Notaries Law in 2014.[47] Article 43(3) permits deeds to use a language other than Indonesian, unless another law requires Indonesian to be used. This, however, contradicts Article 43(1), which was unaffected by the amendments, and, as mentioned, requires use of Indonesian. Article 46(3)) adds that where a foreign language is used, the notary must ensure the parties understand the meaning of that version of the deed. To this end, the notary must either understand the other language or use a sworn translator to explain the foreign language version. Article 46(6) says that if a dispute arises about the different language versions of the deed, the Indonesian version prevails.

Article 31 of Law 24 of 2009 on the National Flag, Language, and Symbols, and the National Anthem adds further uncertainty. This requires state institutions, governments, and private entities to use Indonesian in their contracts. To help resolve this uncertainty, the Minister of Law and Human Rights issued a Circular Letter (*surat edaran*) stating that private commercial contracts prepared 'in foreign languages, particularly English', would not be invalid simply because they were not in Indonesian.[48] The Circular stated that contracting parties could prepare contracts in dual languages. They could then choose which language version prevails if a dispute or difference in interpretation arises, or in the event of inconsistency between them. It also said that Law 24 of 2009 did not have retrospective effect, so contracts made before 2009 would not be affected.

While the Circular Letter can be treated as a guide, it is not binding and cannot override statutes such as the Notaries Law or the National Flag, Languages and Symbols Law. Most contracting parties who want certainty therefore elect to abide by the Indonesian language requirement. Parties can create bilingual notarial deeds and contracts but they should anticipate that the state, including the courts, might recognize only the Indonesian version. This happened in a 2013 decision, *PT Bangun Karya Pratama Lestari v Nine AM Ltd*. Here,

[44] Art 1877, Indonesian Civil Code, and see generally Arts 1867–94 on 'Evidence in Writing'.
[45] Arts 1870, 1871, Indonesian Civil Code.
[46] See Chapter 15.
[47] By passage of Law 2 of 2014.
[48] Minister of Law and Human Rights Circular M.HH.UM.01.01-35 of 2009 on Clarification of the Implications and Implementation of Law 24 of 2009.

the West Jakarta District Court decided that a loan agreement between an Indonesian company and a US-based lender involving a fiduciary security was void because the contract was not executed in Indonesian. The Court reasoned that using Indonesian was mandatory under Article 31(1) of Law 24 of 2009, and that because the contract did not use Indonesian, it was an illegal contract within the meaning of Articles 1335 and 1337 of the Indonesian Civil Code.[49] The Court referred to the Circular Letter, but said that ministerial letters are not included in the hierarchy of Indonesian laws and regulations, so gave it no weight. If a party did not agree with the word 'required' (*wajib*) in Article 31(1), the Court said, the correct procedure was to challenge the Article in the Constitutional Court.[50] This decision has since been affirmed by the Jakarta High Court and the Supreme Court.[51]

Finally, we note that Article 48(1) of Government Regulation 82 of 2012 on Electronic Systems and Transactions also requires use of Indonesian for 'electronic contracts and other contracts intended for Indonesian citizens'.[52]

Regulatory oversight

Notaries have a single professional association: the Indonesian Notary Association (*Ikatan Notaris Indonesia*, INI). As required by the Notaries Law, the association has produced a detailed Notaries Code of Conduct. Unlike the bar association, the notary association lacks statutory power to hear complaints or enforce sanctions against its members. Association members do, however, sit on the Notaries Supervisory Council (*Majelis Pengawas Notaris*), a statutory body established by the Ministry of Law and Human Rights (Article 67 of the Notaries Law). This Council comprises nine members: three government representatives, three experts or academics, and three notary association members. It supervises notaries and can suspend or dismiss them (Articles 67 and 73(1)(f)) and has central, provincial, and regional branches at the county/city level (Article 68). Regional councils can investigate and question notaries, approve leave for six months to one year, provide oral or written warnings, and provide recommendations to the central Council on suspensions or terminations (Article 73). The Council has been criticized for performing its duties half-heartedly, and reportedly failed to dismiss a single notary between 2005 and 2008, despite finding clear breaches of laws and ethics.[53] Some claim that the Council does not, therefore, protect the public—the purpose of its establishment—but rather functions to protect bad notaries. The Notary Law also requires the Ministry to establish a Notary Honour Council (*Majelis Kehormatan Notaris*) to help 'develop' the profession (Article 66A), but is unclear about the respective tasks and relative authority of the Honour Council and the Supervisory Council.[54]

Like the bar association, INI has split into two groups competing to establish themselves as the sole legitimate professional association. Preoccupied by this competition, neither has been effective in enforcing the Code of Conduct. This, along with the ethics councils' failures, means that notaries are subject to little effective oversight, which has fuelled widespread criticism of the profession for unethical behaviour. It is, for example, commonly assumed that most notaries will illegally backdate deeds to assist clients who have missed a deadline. Many notaries are also accused of conveyancing fraud, to which we now turn.

[49] We discuss contract law in Chapter 15.

[50] Decision 451/Pdt.G/2012/PN.Jkt.Bar, p. 61.

[51] See Decision 451/Pdt.G/2012/PN.Jkt.Bar of 20 June 2013; Decision 48/Pdt/2014/PT.DKI of 7 May 2014; and Decision 601/K/Pdt/2015 of 31 August 2015.

[52] Rimba Supriyantna, M Yasin, and Mahinda Arkyasa, 'Government Mandates Some Electronic Contracts to Be Written in Bahasa Indonesia' *Hukumonline* (7 January 2013).

[53] 'Tak Ada Hukuman Buat Notaris Nakal' *Hukumonline* (7 February 2009).

[54] 'Catat! Notaris "Dikawal" Dua Lembaga Etik' *Hukumonline* (8 March 2016) <http://www.hukumonline.com/berita/baca/lt56dea68beec21/catat-notaris-dikawal-dua-lembaga-etik>.

Conveyancing fraud

As mentioned, some notaries are also land conveyance officials, which enables them to validate, document, and report land transactions. These involve calculating the tax payable to the government on such transactions, which is 2.5 per cent for both vendors and purchasers.[55]

Some notaries reduce the tax payable to the government by conspiring with the parties to reduce the reported price of the transaction.[56] This form of fraud can be difficult to detect, as the Indonesian tax system is based on self-assessement, unless the reported sale price is less than the tax object sale value (*nilai jual objek pajak*—NJOP). This is the value of land per metre square calculated by reference to the median price of land in that area, the standard generally used in real property valuation in Indonesia.[57] Although a notary doing this can be prosecuted under Articles 263 and 264 of the Indonesian Criminal Code for forging a document and facilitating tax evasion, corrupt reporting of land values by notaries is believed to occur frequently.

FOREIGN LAWYERS

Foreign lawyers, or 'foreign advocates' as the Advocates Law describes them in Article 1(8), are regulated by Article 23 of the Advocates Law, and by Minister for Justice and Human Rights Decision M.11-HT.04.02 of 2004 on Requirements and Procedures to Employ Foreign Advocates and Obligations to Provide Free Legal Services to the Legal Education and Research World.

Restrictions on practice

Foreign lawyers are prohibited from appearing before courts, practising, and opening law offices or representative offices, in Indonesia. Indonesian law firms can, however, hire foreign lawyers as employees or experts in foreign law, if recommended by the bar association and permitted by the government (Article 23(2) of the Advocates Law). The process for obtaining permission is detailed below.

Serious penalties apply for foreigners who provide 'legal services' in Indonesia without government permission. Article 1(1) of the Advocates Law defines an advocate as 'a person whose profession is providing legal services' and Article 1(2) provides a broad definition of 'legal services' as:

> services given by advocates in the form of providing legal consultation, legal assistance, exercising legal authority, representing, accompanying, defending or performing other legal actions in the legal interests of a client.

Any foreigner not hired by a local law firm who provides 'legal services' is working as an advocate without legal authority—a criminal offence. Article 31 of the Advocates Law provides that any person who performs 'professional work of an advocate' or 'acts as if an advocate', but who is not an advocate as provided in the Law, faces a maximum prison sentence of five years and a maximum fine of Rp 50 million.

As mentioned, the Constitutional Court reviewed Article 31 of the Advocates Law in 2004. The Court reinterpreted that provision to allow community paralegals to provide

[55] Art 2, Government Regulation 34 of 2016 on Income Tax on the Profit from Transfer of Land and/or Buildings, and Conditional Sale and Purchase Agreement of Land and/or Buildings.

[56] For instance, see: 'Dirjen Pajak Lakukan Pembersihan Terhadap Notaris Nakal' *Hukumonline* (2 July 2001); Anas Miftakhudin, 'Korupsi Pajak, Notaris Johanes Ditahan' *Tribun News* (19 July 2016).

[57] Art 1, Law 12 of 1985 on Land and Building Tax.

most services that advocates provide (other than appearance in court), in order to meet community needs for access to justice, particularly in poor and rural areas. However, this decision has not been interpreted as also authorizing foreign lawyers to act as advocates without government approval. After all, foreign lawyers rarely provide community paralegal support for poor and needy communities. In any event, the complex regulatory and bureaucratic regime regulating foreign lawyers in Indonesia, described below, suggests that foreign lawyers are excluded from the operation of the Constitutional Court decision.

Foreign lawyers in Indonesian law firms

The Advocates Law defines a foreign lawyer as an advocate of foreign nationality who practises his or her profession in the territory of the Republic of Indonesia, under prevailing laws (Article 1(8)). As mentioned, they can practise in Indonesia as an employee or expert staff of an Indonesian law firm. However, they are only permitted to practise in the law in respect of which they are qualified, not Indonesian law.

Foreign lawyers must comply with the 2002 PERADI Code of Conduct and other relevant regulations (Article 24 of the Advocates Law; Article 6 of the PERADI Code) and they must provide 'free legal services … to the world of education and legal research' (Article 23(3) of the Law). Foreign lawyers must also help to improve the legal services provided by the Indonesian law firm where they work (Article 5(3)(b) of Minister for Justice and Human Rights Decision M.11-HT.04.02 of 2004) and transfer their skills and professional abilities to Indonesian advocates (Article 5(3)(c)). They must provide at least ten hours per month of free legal services to 'the world' of education, legal research or government agencies (Article 5(3)(d)).

A foreign lawyer who does not meet these obligations faces 'sanctions based on workforce and immigration laws' (Article 10(2) of the 2004 Ministerial Decision). More specifically, the Minister for Law and Human Rights or an appointed government official is to inform the Workforce and Transmigration Minister of violations and propose that the foreign advocate's work permit be cancelled (Article 10(3)).

Permission to work as a foreign lawyer

Applying to work as a consultant with an Indonesian law firm is, as mentioned, complex and time-consuming. The law firm must apply to the Minister of Law and Human Rights, with a written recommendation from PERADI. Before providing this, PERADI requires foreign lawyers to pass a foreign advocate licence exam based on its Code of Conduct.[58] The application must also include a copy of the contract between the law firm and the foreign lawyer, legalized by a notary (Article 3(2)(a), (b) of the 2004 Ministerial Decision) and:

- the foreign lawyer's curriculum vitae;
- a photocopy of the foreign lawyer's practising certificate, legalized by the Indonesian Embassy in his or her country of origin;
- a letter explaining that the lawyer is active, issued by an official institution and legalized by the foreign Indonesian embassy in his or her country of origin;
- a letter explaining that the lawyer is a member of a legal professional organization, legalized by the foreign Indonesian embassy in his or her country of origin;

[58] Art 6, Code of Conduct; Arts 23(2), 24, Advocates Law.

- a letter indicating that the foreign lawyer is not subject to a travel ban imposed by the Immigration Directorate General;
- a photocopy of his or her passport;
- four passport photographs; and
- the tax numbers of the Indonesian law firm and the foreign lawyer (Article 3(2)(c)).

Foreign lawyers must then obtain a permit from the Minister of Manpower and Transmigration (Article 2(1) of the 2004 Ministerial Decision).

Approval to use a foreign lawyer lasts for one year but can be extended for a further year by application to the Law and Human Rights Minister within sixty days of the original approval expiring. This application must detail the legal services the foreign advocate provided pro bono, as required by the Advocates Law (Article 4 of the 2004 Ministerial Decision).

PART II

LAND LAW

7

Traditional and Customary Law: Adat

INTRODUCTION

In 2000, Indonesia's 1945 Constitution was amended for the second time. Included in this round of amendments were Articles 18, 18A, and 18B, which provide a constitutional basis for two important post-Soeharto reforms directed at empowering those in Indonesia's regions. The first was regional autonomy (*otonomi daerah*), under which significant political and lawmaking powers were granted to democratically elected local governments at the provincial, city, and county levels (Articles 18, 18A, and 18B(1)). The second reform, contained in Article 18B(2), required the state to recognize and respect customary law (*adat*) communities and their traditional rights, provided that they meet various requirements. Given that Article 18B(2) appears under the heading 'Regional Government', the Constitution seems to link adat and local autonomy,[1] implying that adat recognition is part of the broader regional empowerment objective.

In Chapter 3, we demonstrated that regional autonomy (or decentralization) has already radically reconfigured Indonesia's legal and political landscapes. Constitutional recognition of adat rights has not yet had as dramatic an effect but does have the potential to force the state to change the way it regulates and administers the natural resources upon which adat communities rely, such as forests.

We begin this chapter by explaining what adat is. A very broad concept, it is very fluid and varies significantly across Indonesia. We then briefly examine the position of adat within the Indonesian legal system. As we explain, adat had greater formal legal prominence under Dutch colonialism than it has had since Independence in 1945, when it has been marginalized, despite pre-1998 governments often using it rhetorically to legitimize new laws and judicial decisions. In the post-Soeharto period, however, adat appears to be undergoing a qualified legal renaissance. On the one hand, the Constitutional Court has enforced Article 18B(2) and other constitutional provisions in several decisions, invalidating legislation that ignores the rights of communities that follow adat. On the other hand, as Indonesia urbanizes and the government continues to regulate, the formal 'space' for adat within Indonesia's legal system shrinks, as do the number of Indonesians who follow it.

What is adat?

Adat is commonly translated as 'customary law' or 'traditional law'. As discussed below, this nomenclature can obscure several important characteristics of adat. Far from being fixed or ancient, most adat is, in fact, highly dynamic. Primarily oral, it is broad in scope and much of it does not even appear to fall within western definitions of 'law'. It is also as much a process as it is a set of legal rules.

[1] Gary F Bell, 'Indonesia: The Challenges of Legal Diversity and Law Reform' in E Ann Black and Gary F Bell (eds), *Law and Legal Institutions of Asia: Traditions, Adaptations and Innovations* (Cambridge University Press 2011).

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Diversity

Adat applies primarily to land, some family law issues (including marriage, divorce, and inheritance), contracts, and a few criminal offences.[2] Indonesia has several hundred ethnic groups each with separate traditional customary legal cultures, 'their content and form as diverse as the societies that have developed them'.[3] This means it varies significantly from place to place—even across relatively short distances.[4] It can be territorial, as with Javanese adat; genealogical, as with Minangkabau adat in Northern Sumatra; or religious, as with adat in Flores, which is based on Catholic traditions.

Adat inheritance law provides an example of this lack of uniformity.[5] Minangkabau adat in Sumatra provides for matrilineal inheritance, that is, land and property pass from mother to daughter. By contrast, Gayo adat, which applies on the opposite coast of the same island, does not specify how wealth is to be transmitted.[6] On the other hand, Balinese adat is patrilineal, with the male generally inheriting the family's assets, leaving the female with a right to enjoy the property of her parent's or husband's estate.[7] Adat systems in Java tend, however, to recognize bilateral kinship systems by which both male and female children have inheritance rights.[8] As discussed in Chapter 22, these inheritance rules have now been largely displaced by state laws, but they are still used consensually in many communities to determine how deceased estates are distributed.

For all of adat's famous diversity, it is said that most, if not all, adat systems share several universal principles. First proposed by Dutch scholar Van Vollenhoven in the early 1900s,[9] these include:

> a preponderance of communal over individual interests, a close relationship between [people] and the soil, an all-pervasive 'magical' and religious pattern of thought, and a strong family-oriented atmosphere in which every effort [is] made to [resolve] disputes through conciliation and mutual consideration.[10]

This focus on the community, equilibrium, and harmony, rather than on the individual and his or her rights, is said to manifest itself in a preference for informal mediation through deliberation and consensus (*musyawarah* and *mufakat*) and an emphasis on community members assisting one another as required (*gotong royong*).[11] Indeed, it is often said that adat resists analysis based on western notions of enforceable individual rights and obligations and, accordingly, lacks institutions that allow individuals to easily exercise rights against other individuals.[12]

[2] 'Pengadilan Adat Papua, Bentuk Pengakuan Terhadap Living Law' *Hukumonline* (24 August 2005). We discuss criminal law and *adat* below.

[3] Timothy Lindsey, *The Indonesian Legal System, LMC 101* (Northern Territory University, Faculty of Law, Centre for Southeast Asian Law 1996) 26.

[4] Matt Stephens, 'Local-Level Dispute Resolution in Post-Reformasi Indonesia: Lessons from the Philippines' (2003) 5(3) *Australian Journal of Asian Law* 222.

[5] Bell (n 1) 268.

[6] John R Bowen, 'The Transformation of an Indonesian Property System: Adat, Islam, and Social Change in the Gayo Highlands' (1988) 15(2) *American Ethnologist* 274, 277.

[7] Daniel S Lev, 'The Supreme Court and Adat Inheritance Law in Indonesia' (1962) 11(2) *The American Journal of Comparative Law* 205, 213–14; Amrie Hakim, 'Hak Waris Perempuan Menurut Hukum Adat Bali' (27 March 2012).

[8] Bell (n 1).

[9] C Van Vollenhoven divided Indonesian *adat* into nineteen *adat* law circles (*adatrechtskring*), based upon cultural and language classifications 'each defined usually by the relative mixture of kinship and territoriality used to create social units—clans, villages, clan-villages and so forth': John Bowen, *Islam, Law, and Equality in Indonesia: An Anthropology of Public Reasoning* (Cambridge University Press 2003) 47.

[10] S Takdir Alisjahbana, *Indonesia: Social and Cultural Revolution* (Oxford University Press 1966) 71.

[11] MB Hooker, *Adat Law in Modern Indonesia* (Oxford University Press 1978) 63.

[12] ibid.

The communal nature of entitlements to land is another common feature. Though land can be held by individuals in some systems, in many it is held communally under the so-called *hak ulayat*. This is the adat community's right of control of: the allocation and use of land and any resources produced on, or contained within, it; the purpose for which it can be used; and for how long it may be so used. Often it will be the village head (*kepala desa*) who decides these matters;[13] in others, adat elders or councils decide; in still other cases, a process of *musyawarah* is necessary.

Adat as 'law'

Adat has various meanings depending on the context in which it is used. According to Bowen:

> *Adat* can refer to the rules or practices of social life, to feelings and a sense of propriety, or to a somewhat thinner sense of tradition and custom. It may be used to refer to local ways of resolving disputes, rather than to substantive rules, and has been so used in recent appeals to *adat* ways of overcoming hostility in Ambon and Kalimantan, the sites of violent clashes between social groups. Often it is counterposed to Islamic law or state law. Recently it has been used to mean 'local' as opposed to 'national'. *Adat* also has a narrower sense, that of '*adat* law' an expression whose systematic use dates from the period of Dutch colonial rule.[14]

Accordingly, while adat is usually translated as customary 'law', its meaning is far broader, referring also to

> law, rule, precept, morality, usage, custom, agreements, conventions, principles, the act of conforming to the usages of society, decent behaviour, ceremonial, the practice of magic, sorcery [or] ritual.[15]

As discussed below, when the Dutch attempted to catalogue bodies of adat law, they described adat in terms of western concepts of rights and obligations. One issue of debate has been the extent to which the various concepts of adat are really amenable to categorization according to western conceptions of 'law', if at all. This is because many adat systems emphasize maintaining cosmological and communal equilibrium over imposing sanctions for non-compliance. For some positivists, who contend that rules without sanctions cannot constitute law, only 'adat' rules with sanctions should be treated as law.[16] Other 'rules' should be considered mere 'custom'. Most modern scholars disagree, however, arguing that:

> The better approach is to regard as cultural sanctions all those factors which contribute to the maintenance of rights and obligations; all sanctions are legal in so far as they contribute to this maintenance, and hence a 'moral' sanction fulfilling this function would be a legal sanction.[17]

Both sanctions and the customs they support can change over time, of course. Indeed, the common translation of adat as 'tradition' or 'custom' appears to lend it a staidness that is misleading. In reality, adat law is fluid to the extent that Stephens calls it 'intrinsically dynamic, unpredictable and uncertain'.[18] Adat law is therefore often called 'living law',

[13] Daniel Fitzpatrick, 'Disputes and Pluralism in Modern Indonesian Land Law' (1997) 22 *Yale Journal of International Law* 171.

[14] Bowen (n 9) 13. [15] Hooker (n 11) 50.

[16] See JC Vergouwen, *The Social Organisation and Customary Law of the Toba-Batak of Northern Sumatra* (M Nijhoff 1964).

[17] Hooker (n 11) 146. See also Rachael Haverfield, 'Hak Ulayat and the State: Land Reform in Indonesia' in Tim Lindsey (ed), *Indonesia: Law and Society* (1st edn, Federation Press 1999) 43; Fitzpatrick (n 13) 178–79.

[18] Stephens (n 4) 222.

changing with the society it governs, and absorbing outside influences.[19] In the words of famous Indonesian adat scholar Soepomo:

> *Adat* law is a living law, because it reflects the real feelings of society. In accordance with its own characteristics, *adat* is continually in a state of growth like life itself.[20]

Adat as process

The term 'adat' can, as mentioned, refer also to the process by which village-level disputes are settled. This dispute settlement process resembles mediation and is usually aimed at reconciling those involved in a dispute, with consensus-based outcomes and compromise generally preferred over upholding the interests of one party over another.

The way these adat disputes are resolved varies from place to place.[21] Most commonly, villagers with disputes will informally approach community leaders, such as adat or religious figures, seeking their help as mediators. Villagers can also proceed less informally, asking either the village head or the village council to mediate. While the 'consensus' reached will usually be taken to bind the parties, it is still possible for most types of dispute to be heard afresh by a state court, the decision of which will formally override any adat resolution. This means that applying adat usually requires the consent of those involved and their agreement not to involve the state.

Surveys have found that rural Indonesians prefer informal, consensus-based resolution of disputes over the formal legal system for various reasons.[22] These include that informal processes are more convenient and swift, and usually less confrontational. Also, many appear to prefer their disputes being handled in a way that considers the interests of the entire community rather than just the parties to the dispute. These interests are often better served by compromise rather than the assertion of rights. As Lev puts it:

> [S]ettlements induced from outside may deny a community whatever benefit of social cohesion might have accrued from resolving issues internally … the cultural penchant for compromise of personal conflicts remains strong …[23]

Given these benefits, adat processes are generally considered 'appropriate and largely effective' to resolve many types of small-scale cases.[24] Care must be taken, however, not to assume this is always true. Indeed, adat processes are also notorious for susceptibility to power imbalances, patronage, and even coercion to ensure a particular outcome, which is then presented as consensus when it is, in fact, anything but that. This is particularly true when one party to the dispute is poor, female, a member of a minority group, or otherwise vulnerable. According to Stephens:

> Musyawarah, or consensus deliberation, is often an elite-dominated process where law and/or *adat* is rarely considered. The weak are pushed into accepting an outcome which favours the powerful and are then coerced into not complaining about the decision.[25]

[19] Franz von Benda-Beckmann and Keebet von Benda-Beckmann, 'Myths and Stereotypes about Adat Law: A Reassessment of Van Vollenhoven in the Light of Current Struggles over Adat Law in Indonesia' (2011) 167(2–3) *Bijdragen tot de Taal-, Land- en Volkenkunde* 167, 169–71.

[20] Soepomo, *Bab-bab tentang Hukum Adat* (4th edn, Penerbitan Universitas 1966) 6.

[21] Stephens (n 4) 4.

[22] Asia Foundation and ACNielsen Indonesia, *Survey Report on Citizens' Perceptions of the Indonesian Justice Sector: Preliminary Findings and Recommendations* (Asia Foundation 2001); Stephens (n 4) 214; World Bank, *Village Justice in Indonesia: Case Studies on Access to Justice, Village Democracy and Governance* (World Bank 2004) 163.

[23] Daniel S Lev, 'Judicial Institutions and Legal Culture in Indonesia' in Claire Holt (ed), *Culture and Politics in Indonesia* (Cornell University Press 1972) 284–85.

[24] Matt Stephens and Samuel Clark, *Forging the Middle Ground: Engaging Non-State Justice in Indonesia* (World Bank Indonesia, Social Development Unit, Justice for the Poor Program 2008) 61.

[25] Stephens (n 4) 228.

Who follows adat?

Adat is mostly practised outside urban centres, in rural areas where the reach of the modern state and its laws is still limited. The number of Indonesians living under adat is therefore often considered to roughly equate with the number of Indonesians living in rural areas. In 1971, when just 14.8 per cent of Indonesians lived in cities, commentators estimated that adat governed the lives of 80–90 per cent of Indonesians.[26] As the late Professor Satjipto Rahardjo put it:

> Legal transformation has occurred at the formal or state level, while life in the rest of society still proceeds in traditional ways. The legal sector is stratified, with the modern legal system in a thin layer at the top and the age-old structure, processes, and practices forming the substantial component.[27]

However, adherence to adat might now be declining faster than Indonesia's urbanization rate. By 2010, around 50 per cent of Indonesians lived in cities[28] but one of Indonesia's leading adat-focused NGOs, AMAN,[29] recently estimated that only between 50 and 70 million Indonesians still adhere to adat and maintain an identity as part of an adat community.[30] If urbanization was the main reason for the decline, then one would have expected AMAN's estimate to be closer to half of Indonesia's population of around 250 million. Nevertheless, to the extent that urbanization contributes to reduced use of adat, further decline appears inevitable. Indonesia's urbanization rate is predicted to rise to around 68 per cent by 2025 and to 82 per cent by 2045.[31]

Similarly, because adat applies autonomously only in the absence of state law, the 'space' within which adat operates within the formal legal system is limited and has, in fact, been shrinking as the state continues to regulate an ever-expanding range of issues.[32] However, as discussed later in this chapter, the Constitutional Court recently decided that when the state 'regulates', it must take into account the rights of traditional communities. Exactly what this means in practice, and whether it will, in fact, lead to strengthening of adat remains uncertain

HISTORY OF ADAT

Since the Dutch colonial period until relatively recently, the position of customary law within the Indonesian legal system has been largely subject to the whim of the government. In particular, state law has long formally prevailed over adat to the extent of any inconsistency, allowing the government to ignore it with the stroke of a pen.

This is attributable to the complex plural legal structure the Dutch established during their colonization of Indonesia, dividing the population into three groups based on race. Dutch law applied to 'Europeans' and 'foreign orientals' (chiefly Chinese, Arabs, and Indians) except in family matters.[33] By contrast, the Dutch permitted 'native' Indonesians

[26] Hooker (n 11) 25.

[27] Satjipto Rahardjo, 'Between Two Worlds: Modern State and Traditional Society in Indonesia' (1994) 28(3) *Law & Society Review* 493, 494.

[28] Chotib Hasan, 'A Crowded City Can Be a Sign of a Good Thing for Indonesians' *The Conversation* (15 September 2014).

[29] Indigenous Peoples Alliance of the Archipelago—*Aliansi Masyarakat Adat Nusantara.*

[30] Abdon Nabadan, *Sinergitas Hukum Adat dan Hukum Negara dalam Membentuk Masyarakat Tertib Hukum di Indonesia*, in National Seminar on 'Kearifan Lokal dan Hukum Adat dalam Meningkatkan Tertib Hukum Masyarakat' (Pontianak, 20 March 2013). In 2006, the Indonesian Commission for Human Rights (*Komnas HAM*) estimated that there were over 20,000 *adat* communities throughout Indonesia: 'Berdayakan Masyarakat Hukum Adat untuk Perlindungan Lingkungan' *Hukumonline* (3 August 2006).

[31] Hasan (n 28).

[32] Patricia Spyer, 'Diversity with a Difference: "adat" and the New Order in Aru (Eastern Indonesia)' (1996) 11 *Cultural Anthropology* 25, 28.

[33] Art 131, *Netherlands-Indies State Act (Indische Staatsregeling)* of 1926.

to continue to live largely under their pre-existing traditional legal structures,[34] even establishing a system of separate adat courts.[35] However, the Dutch did not permit this out of deference for adat; rather they were motivated by commercial expediency, concerned to minimize the disruption to their commercial interests that attempting to displace adat might have caused.[36] Better still, in some cases adat helped maintain, and even exaggerate, cultural and ethnic divisions in Indonesian society, allowing the Dutch to 'divide and rule'.[37]

The Dutch also recognized adat as a useful counter-force to Islam, which they feared could be used to mobilize Indonesians against their rule, and therefore sought to privilege adat over Islamic law. Adat was therefore formally recognized as a form of law in its own right, albeit with limitations, while Islamic legal traditions could only be enforced to the extent they had been absorbed by, or 'received into', adat, often in a heavily qualified or distorted form.[38]

Midway through the nineteenth century, the Dutch considered whether adat should be unified, modernized, and then codified.[39] They were largely motived to do so by ethical concerns that emerged during this period about the need to improve the lot of 'natives'.[40] Proponents of codification argued that adat was too uncertain and unsophisticated for the modern world of commerce and civil relations.[41] On this view, Indonesians could not compete with the Dutch, Chinese, or others in the colony without having more modern laws.

The influential Dutch legal scholar Professor Cornelis Van Vollenhoven successfully opposed these proposals. He argued that unification would ignore Indonesia's cultural, linguistic, and economic diversity and that changing adat would be unjust and disruptive, perhaps hindering the development of Indonesians and leading to unrest.[42] As Van Vollenhoven put it, the 'destruction of adat law will not pave the way for our codified law, but for social chaos and Islam'.[43] The colonial regime sided with Van Vollenhoven, whose views, although genuinely held, required it to do nothing and, in fact, supported its economic and political interests.

Very similar debates about adat took place soon after Independence. The 1945 Constitution specified that Dutch law remained in force until replaced[44] but there was disagreement about whether new laws should be based on adat law modified to suit modern conditions or European-style codes suited to local needs.[45] For some, adat was indigenous, unassociated with colonial rule, and inherently familiar to many Indonesians. Many also saw it as an effective historical symbol of opposition to Islam, a potential rival to the authority of some nationalist politicians.[46] For others, adat was primitive and inadequate to propel Indonesia into the international sphere.[47] Adat's rules and processes had developed

[34] There were some exceptions that largely corresponded with Dutch commercial interests. For example, some types of contracts had to be formalized under the Dutch Civil Code: MB Hooker, *A Concise Legal History of South-East Asia* (Clarendon Press; Oxford University Press 1978) 190. *Adat* was also not formally recognized if it offended accepted principles of western justice and equity: Art 75(3), Constitution of 1854.

[35] These were abolished soon after Independence by Emergency Law 1 of 1951 and Law 19 of 1964 on Judicial Power.

[36] DS Lev, 'Colonial Law and the Genesis of the Indonesian State' (1985) 40 *Indonesia* 57, 58; Alisjahbana (n 10) 89.

[37] Hans Thoolen, *Indonesia and the Rule of Law: Twenty Years Of 'New Order' Government: A Study* (Francis Pinter 1987) 3 34; Lev (n 36) 65.

[38] MC Ricklefs, *A History of Modern Indonesia since C. 1300* (2nd edn, Stanford University Press 1993) 169.

[39] Hooker (n 34) 191.

[40] Craig Thorburn, 'Adat, Conflict and Reconciliation: The Kei Islands, Southeast Maluku' in Tim Lindsey (ed), *Indonesia: Law and Society* (2nd edn, Federation Press 2008).

[41] Lev (n 36) 64. [42] Lev (n 7) 206.

[43] JF Holleman and HWJ Sonius (eds), *Van Vollenhoven on Indonesian Adat Law: Selections from Het Adatrecht van Nederlandsch-Indië (Volume I, 1918; Volume II, 1931)* (Martinus Nijhoff 1981) 122.

[44] Art II, Transitional Provisions, Constitution of 1945. [45] Thoolen (n 37) 32.

[46] Daniel Lev, 'The Lady and the Banyan Tree: Civil-Law Change in Indonesia' (1965) 14 *The American Journal of Comparative Law* 282, 303.

[47] Lev (n 7) 210.

to meet the contingencies of village life and therefore could not support the needs of a modern state, much less a developing economy.[48]

In the 1950s, Indonesian lawyers and leaders resolved this position with an uneasy melange of adat and western-style laws. On the one hand, they recognized that economic progress and social revolution required new modern law. On the other hand, they stopped short of declaring adat law inadequate for these tasks and did not abolish it.[49] Soepomo, one of Indonesia's foremost legal scholars of the time, described the approach that was taken in idealistic terms:

> Local tradition must be linked with a broad and fluid modern national law which will take into account social reality. The ancient and the modern must be interwoven to form one flexible whole.[50]

As a result, the principles Van Vollenhoven had identified as universal to Indonesian adat law were proclaimed as the bases of new national law.[51] This was affirmed by the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*, MPR) in 1966:

> The principles for developing the national law must correspond with the political direction of the state and must be based on adat law that does not hamper the promotion of a just and prosperous society.[52]

However, synthesizing adat with state-made law rarely worked in adat's favour and most Indonesian lawyers, administrators, intellectuals, and politicians paid little more than lip service to it, particularly during Soeharto's rule (1966–98).[53] Successive Indonesian governments have used the indigenous nature of adat to legitimize law and legal reform[54] but many of these laws and reforms in fact contradicted adat principles, thereby formally abolishing them. Adat was often pushed aside by pressures for modernization and economic development.

Land law and adat

A classic example discussed in much of the literature on adat is land law reform under Indonesia's 1960 Agrarian Law.[55] On the one hand, the Agrarian Law itself claims that Indonesia's land law is 'adat'. On the other, Article 5 confines this to adat that does not conflict with the 'national interest', Indonesian socialism, and 'other laws'. In fact, Article 5 provides the state with authority to simply override adat as it deems necessary, in the interests of 'development' (*pembangunan*).

As we show in more detail in the next chapter, the Agrarian Law itself establishes a range of statutory land rights that override adat land rights. Many of these new rights are individualistic in nature and western in origin, and require registration to be enforceable against third parties. Hooker describes the *hak milik* (ownership right), for example, as 'a radical departure from traditional Indonesian views on ownership'.[56] While some adat communities recognize that the effort and capital an individual invests in a piece of land can create a personal tie between that person and the land, the primary adat equivalent of 'ownership' is *hak ulayat*, or communal title.[57] For its part, the Agrarian Law provides no protection for *hak ulayat*. It establishes no mechanisms for its registration and, in Article

[48] Lev (n 46) 302–03.
[49] John Ball, *Indonesian Law at the Crossroads: Commentary and Materials* (Oughtershaw Press 1996) 43.
[50] Soepomo, *Memorandum*, cited in ibid 49.
[51] Lindsey (n 3) 28.
[52] MPRS Decision II/1960, appendix A, para 402.
[53] Daniel S Lev, 'Book Review: Van Vollenhoven on Indonesian Adat Law by J.F. Holleman' (1984) 22 *Journal of Legal Pluralism* 147, 154.
[54] Lev (n 46) 303. [55] Law 5 of 1960. [56] Hooker (n 11) 118.
[57] Van Vollenhoven and Ter Haar actually denied that the rights of an individual could amount to 'ownership' in the European sense: Hooker (n 11) 119.

3, even states that it must be 'adjusted' to conform to national interests. Indeed, the elucidation to Article 5 describes as 'unjustifiable' attempts by a customary law community to block the formal allocation of land rights to another if doing so contradicts the 'broader interests of the nation and state'.

One result of the fact that *hak ulayat* is recognized but not registrable is that it has, for most of Indonesia's history since Independence in 1945, been vulnerable to being taken over by the state, or by those who claim statutory rights over the same land.[58] Another is that the Agrarian Law has been largely ignored, particularly in rural Indonesia, where land registration levels are still low. Despite a strong push from the Widodo administration, only between 40 and 45 per cent of Indonesia's land is registered as required by the Law.[59] This has, in practice, been highly disadvantageous for traditional communities. Many of them cannot prove entitlements to land in disputes that arise with outsiders who seek to exploit the natural resources contained on or within that land. As discussed below, however, in recent years state recognition of adat rights appears to have improved, at least on paper.

Adat in the courts

Another means by which adat principles and concepts have made their way into the formal legal system is through judicial decisions. If no state law applies to a dispute, then judges can determine and apply any adat relevant to that dispute.[60] The formal legal bases for this power have been contained in successive iterations of Indonesia's Law on Judicial Power.[61] Provisions in this Law, on the one hand, prohibit judges from refusing to decide a case on grounds that no written law applies to the case and, on the other, require judges to 'explore, follow and understand the current living legal values and sense of justice within society'.[62] Even though these provisions do not specifically refer to adat, they are widely understood to capture it, given that, as mentioned, adat itself is often described as 'living law'.

Even though the courts have formally recognized and applied adat, they have also been criticized for distorting it, both deliberately and unintentionally. As Lev puts it:

> [J]udges particularly have become accustomed to claiming a myriad of virtues in the name of *adat* law. It is often the case that a judge will interpret a rule according to his own judgement, or according to various pressures, and then simply assert this interpretation to be the *adat*.[63]

In particular, Lev argues that Supreme Court judges distorted adat in the 1950s in an effort to modernize it, with a view to effecting economic and social change, primarily to improve female equality.[64] For example, in a series of cases, the Supreme Court began recognizing widows as heirs of their husbands. This contradicted the adat prevailing in many parts of Indonesia, where a widow had a right only to property that she brought into the marriage, plus a share in any property jointly acquired during the marriage.[65]

There is also much scope for inadvertent judicial distortion of adat. Given that much of adat is oral, it can be difficult to determine the content of an adat principle or concept. For guidance, some judges look to scholarly compilations of adat produced by legal

[58] Fitzpatrick (n 13) 186.

[59] 'Presiden Jokowi: Financial Inclusion Dari Sertifikat Tanah Rp23 Triliun' *Elshinta.com* (5 December 2016) <https://elshinta.com/news/90475/2016/12/05/presiden-jokowi-financial-inclusion-dari-sertifikat-tanah-rp23-triliun>; 'Kepala BPN: Hanya 45 Persen Tanah Yang Bersertifikat' *Tempo* (16 August 2016) <https://bisnis.tempo.co/read/news/2016/08/16/090796339/kepala-bpn-hanya-45-persen-tanah-yang-bersertifikat>.

[60] Seno Adji, 'An Indonesian Perspective on the American Constitutional Influence' in Lawrence Beer (ed), *Constitutionalism in Asia: Asian Views of the American Influence* (University of California Press 1979) 108.

[61] Laws 48 of 2009, 4 of 2004, 35 of 1999, and 14 of 1970.

[62] Art 28(1), Law 14 on Judicial Power; Art 5(1), Law 48 of 2009 on Judicial Power.

[63] Lev (n 7) 210.

[64] ibid 212.

[65] Hooker (n 11) 25. For further examples, see S Pompe, 'Between Crime and Custom: Extra-Marital Sex in Modern Indonesian Law' in T Lindsey (ed), *Law and Society in Indonesia* (1st edn, Federation Press 1999).

anthropologists. Some even continue to rely on Dutch research, most of which is more than 100 years old[66] and is now well out-of-date.[67] Some of it even misrepresents, oversimplifies, and thus distorts or even displaces, the adat 'rules' it sought to identify:

> These processes of creating *adat* law did not so much 'invent' it … but made into rules those expressions and proverbs that once had been public starting-points for complex political processes. These older processes did not apply rules, but sought out equitable solutions to social problems.[68]

To help identify adat principles, other judges instead prefer either to visit the relevant adat community (which now rarely occurs) or summons witnesses from the relevant adat community. These approaches are both highly problematic:

> It is seldom possible for a court to find an unprejudiced witness in a community which has been disturbed by a serious crime. Moreover, one may ask on the basis of what authority members of a particular community can claim the existence of specific *adat* rules. The members of a community are usually all too apt to assert that certain rules exist if their personal sense of justice has been injured, and such rules may be altogether different from shared normative rules.[69]

Adat as pre-trial mediation

The courts also appear able to formally recognize the decisions or 'resolutions' (*penyelesaian*) resulting from adat dispute resolution processes, although there is some disagreement about the propriety of this.[70] The authority for this is a Supreme Court regulation that requires judges to encourage conciliation before proceeding to trial, in all cases.[71] If the parties reach a pre-trial agreement or settlement, they can submit a Settlement Agreement (*Akta Perdamaian*) to the court. Such an agreement could, it seems, contain a settlement or decision reached under adat processes. If accepted, the agreement could then be enforced by a state court.

Adat in criminal cases

Judges can also recognize and apply adat 'crimes' and 'sanctions', provided the general Criminal Code (*Kitab Undang-undang Hukum Pidana*, or KUHP, discussed in Chapter 10) does not prohibit the acts that constitute those adat crimes. Under Article 5(3)(b) of Emergency Law 1 of 1951:

> an act which is criminal according to *adat* but not according to the Criminal Code must be punished according to *adat*, unless the judge considers such punishment to be incompatible with modern views. In the latter case, or in cases in which the *adat* punishment is ignored, a substitute punishment of, at most, three months' imprisonment—or a Rp 500 … fine—may be imposed. If the *adat* punishment is more severe than a three-month prison term, a prison sentence of up to ten years may be imposed by the judge.[72]

Judicial recognition of adat in criminal cases has not always followed the letter of Article 5(3)(b). For example, in 2012, the Supreme Court reportedly upheld an adat tribunal's decision to punish the perpetrator of a sexual assault by ordering that he purchase a goat

[66] Bowen (n 9) 13.
[67] Roelof H Haveman, *The Legality of Adat Criminal Law in Modern Indonesia* (Tatanusa 2002) 79.
[68] Bowen (n 9) 13. [69] Pompe (n 65) 116.
[70] 'Memberdayakan Ketua Adat Sebagai Mediator' *Hukumonline* (10 October 2008).
[71] Supreme Court Regulation 1 of 2008 on Procedures for Mediation in Court.
[72] Pompe (n 65) 106.

and a piece of traditional cloth.[73] Of course, sexual assault is prohibited in the KUHP and, following Article 5(3)(b), the Court should have simply applied the KUHP and ignored the adat tribunal's findings. Likewise, prosecutors have included adat charges in their indictments in at least one case. For example, in their recent prosecution of a celebrity who made a sex tape that was widely distributed on the internet, prosecutors referred to the 2008 Pornography Law and the Criminal Code in their indictment but were concerned that the 2008 Law might not apply because it did not exist when the alleged act was performed and that the Criminal Code charges might fail for other reasons. They therefore included a reference to the alleged act also breaching adat principles.[74] Ultimately, however, prosecutors succeeded on the pornography charges.

Another contentious issue is the extent to which an adat obligation, such as an honour killing, can excuse the commission of a crime.[75] Both the Supreme Court and Constitutional Court have recently indicated that adat cannot operate as a defence[76] but perpetrators still commonly raise it for just that purpose.

ADAT IN THE POST-SOEHARTO ERA

As mentioned, Indonesia's Constitution was amended in 2000 to recognize the rights of traditional communities. Article 18B(2) states:

> The state recognises and respects adat law communities and their traditional rights provided that they are still alive, accord with community developments and the principle of the Unitary State of the Republic of Indonesia, which is regulated by statute.

Article 28I(3) was added in the same amendment round. It states:

> The cultural identity and rights of traditional communities are respected in line with the development of the times and civilisation.

Adat rights were also mentioned in various statutes concerning natural resources enacted from 1999 onward. These included the 1999 Forestry Law,[77] the 2004 Fisheries Law,[78] the 2004 Plantations Law,[79] the 2004 Water Resources Law,[80] the 2009 Environment Protection and Management Law,[81] and the 2007 Coastal Areas and Small Island Management Law.[82] Although these statutes recognized adat rights, they provided only conditional protection for them. Most, for example, required that adat rights be consistent with national interests and prosperity. They also required that the adat 'remain in existence' (*masih hidup*). This seems like a very sensible restriction—after all, an adat principle should not be enforced in an adat community if that principle is not followed there. In practice, however, this restriction has required that the adat community that follows the adat principle must be formally recognized by state law for its adat principles to be recognized or protected. As we explain below, this is a significant impediment. Further, these

[73] Andi Saputra, 'MA Setuju Pemerkosa Tidak Dipenjara Tapi Bayar Seekor Kerbau', *Detik.com* (12 October 2012) <https://news.detik.com/berita/2060783/ma-setuju-pemerkosa-tidak-dipenjara-tapi-bayar-seekor-kerbau>.

[74] 'Penyidik Juga Jerat Cut Tari dengan Hukum Adat' *Hukumonline* (16 October 2010).

[75] Such cases are widely reported. See, for example, A Shohib, 'Sidang Kasus Carok Di PN Bangkalan Berlangsung Ricuh' *Madura Corner* (1 April 2013).

[76] Supreme Court Decision 2281/K/PIS/2007; Constitutional Court Decision 14-17/PUU-V/2007.

[77] Art 67(1), Law 41 of 1999 on Forestry.

[78] Art 6, Law 31 of 2004 on Fisheries.

[79] Art 9, Law 18 of 2004 on Plantations, which requires those who wish to commercially exploit *hak ulayat* land to first engage in *musyawarah* discussion with the *adat* community to reach an agreement on the transfer of the land and any compensation.

[80] Art 6(2), Law 7 on 2004 on Water Resources.

[81] Art 62(1)–(3), Law 32 of 2009 on Environmental Protection and Management.

[82] Arts 21(4)(a) and (c), 61, and 62, Law 27 of 2007 on the Management of Coastal Areas and Small Islands.

provisions do not provide sanctions if, for example, the government or another party violates adat rights. Despite the 'on-paper' protection of these statutes, traditional rights thus remain highly vulnerable to expropriation with inadequate or no compensation.

Regional autonomy and adat

Regional autonomy has enabled Indonesia's regions to formally re-establish traditional governance structures and adat rights that were suppressed during the Soeharto period.[83] Some local governments have issued regional regulations (*Peraturan Daerah* or Perda) to reinstate these structures, including for the purposes of dispute resolution.[84]

Law 6 of 2014 on Villages appears to be a significant development for protecting adat rights, structures, and processes. Article 103 of the Law gives villages authority to administer village-level customary courts, hold adat hearings, and resolve adat disputes based on the customary law that applies in the adat village (Article 103(d)).[85] However, like the natural resources legislation discussed above, the Village Law imposes so many conditions that real adat recognition and protection is little more than a legal mirage.[86]

To use Article 103, communities must obtain formal recognition as an adat village. For this, three conditions must be met. First, the adat community comprising that village must, as mentioned, be 'alive' (that is, in existence): its members must consider themselves part of an adat community (*masyarakat adat*); and the community must have administrative institutions, assets and/or adat norms (Article 97(2)). Second, the adat community must 'accord with community developments' (Article 97(3)). This means that the existence of the adat community and its traditional laws must be 'recognised on the basis of legislation as a reflection of the development of values considered ideal by today's community' (Article 97(3)(a)). The need for statutory recognition alone is likely to prevent recognition and protection. This is because the national legislature, the DPR (*Dewan Perwakilan Rakyat*, People's Representative Assembly) is notoriously slow in enacting even the most pressing legislation, and legislation recognizing traditional rights is unlikely to be a priority. The 'substance of the traditional rights must also be recognised and respected by the adat community itself and the broader community, and must not violate human rights' (Article 97(3)(b)). Finally, the adat community itself must be consistent with the 'Unitary State of the Republic of Indonesia principle' (*Negera Kesatuan Republik Indonesia*, NKRI). It therefore must not threaten the sovereignty of the Republic and its adat norms must not violate the laws of the state (Article 97(4)).

Various adat councils throughout Indonesia appear to have been emboldened by regional autonomy and statutory support for adat rights. Dayak adat groups, located in Kalimantan, seem to have been particularly active and assertive.[87] The Indonesian press has reported local adat councils imposing adat sanctions on government officials and even a university academic, for breaching adat norms. In one case, media reported a local plantations official

[83] Primarily under Law 5 of 1979 on Village Governance, which imposed a one-size-fits-all structure on Indonesian villages and made them all accountable to the central government.

[84] See, for example, Kotawaringin, Timur Regional Regulation 15 of 2001 on Kedamangan, and Pulang Pisau Regional Regulation 11 of 2003 on the Formation of Adat Institutions and Empowerment of Dayak Adat, cited in Peri Umar Farouk and others, *Back to the Future: Regional Autonomy and an Uncertain Adat Revival* (World Bank Justice for the Poor: VJA Provincial Report, Central Kalimantan 2005) 5. See also Gunung Mas Regional Regulation 33 of 2011 about Dayak Adat Institutions in Gunung Mas. We discuss Perda in more detail in Chapter 3.

[85] The process must, however, 'be in accordance with human rights and prioritize deliberation' (Art 103(d)).

[86] These are contained in Art 97, Village Law. See also Art 1(43), 2014 Regional Autonomy Law, which requires that adat principles be formally recognized by state law to be recognized or protected in practice.

[87] For more examples, see Yance Arizona, 'Kedudukan Peradilan Adat dalam Sistem Hukum Nasional' *Diskusi tentang Memperkuat Peradilan Adat di Kalimantan Tengah untuk Penguatan Akses terhadap Keadilan* (11 June 2013).

blaming the smoke haze sitting over Kalimantan on traditional communities, mentioning the Dayaks. The official was called before a Dayak adat council and was ordered to provide various objects and animals to the community as punishment but was permitted to pay Rp 30 million (US$3,000) as a substitute.[88] In another case, an official from the Central Bureau of Statistics (BPS) announced that the Dayak ethnic group had shrunk by 20 per cent. Protests emerged about the factual correctness of this statement, and this led to an adat hearing at which sanctions were imposed similar to those applied to the plantations official.[89]

Perhaps most bizarre was the case against University of Indonesia sociologist Professor Dr Thamrin Amal Tomagola. He appeared as a witness in the sex tape case mentioned above, where he testified that, according to his research, extra-marital coitus was common in many parts of Indonesia, including in Dayak communities. He also made similar comments in the media. He appeared before a Dayak adat tribunal in 2011, where he was found to have caused offence. The tribunal required him to apologize, provide five traditional gongs (*pikul garantung*), and pay a 'peace ceremony' fee of Rp 77,777,000 (US$7,600),[90] an amount apparently chosen because the number seven is a 'holy' number in Dayak tradition.[91] Professor Tomagola has apparently complied with these orders.[92]

The Constitutional Court and adat

Since at least 2011, the Constitutional Court has upheld the rights of traditional adat communities over natural resources—thus far, land, coastal resources, and forests—upon which they rely for their livelihoods. It has done this when reviewing the constitutionality of statutes that authorize the state to grant concessions or licences to use land to the private sector for commercial purposes, including to exploit natural resources on or contained within it. In these cases, the Court has applied a variety of constitutional provisions, including Article 18B(2), although it initially preferred Article 33(3).

One of the first was the *Coastal and Remote Areas Law case*,[93] decided in June 2011. The 2007 Coastal Management Law (the 2007 Law)[94] had granted authority to the government to issue Coastal Water Concessions (*Hak Pengusahaan Perairan Pesisir*) to the private sector, including foreigners, to use coastal waters for aquaculture and tourism.[95] Leaders of various adat communities in coastal areas challenged various provisions of the 2007 Law.[96] These communities had long relied upon coastal resources for their livelihoods and were concerned that the concessions would restrict or prevent them from continuing to use those resources.

The Court held that the 2007 Law's provisions allowing the government to issue these concessions were constitutionally invalid on several grounds. One was that they violated Article 33(3) of the Constitution, which states:

[88] 'Ketika Sanksi Adat Menjangkau Aparat Pemerintah: Ada tiga kasus yang pernah terjadi' *Hukumonline* (21 April 2012).

[89] ibid.

[90] 'Majelis Adat Dayak Vonis Thamrin Amal Tomagola Bersalah' *Tempo* (22 January 2011).

[91] Hukumonline (n 88). [92] ibid.

[93] Constitutional Court Decision 3/PUU-VII/2010, reviewing Law 27 of 2007 on the Management of Coastal Areas and Small Islands.

[94] Law 27 of 2007 on the Management of Coastal Areas and Small Islands.

[95] Art 23(2), (6), and (7). Subject to the concession holder meeting various administrative, technical and operational requirements, these concessions could last for up to sixty years and could cover anywhere from the water's surface to the ocean floor (Art 16). They could be transferred to another party or used as collateral (Art 20).

[96] Specifically, they challenged Arts 1(4), (7), and (18), 14(1), 16(1), 18, 20, 21(1)-(4), and (5), 23(1), (2), (4), (5), and (6), and 60(1) on fourteen separate grounds.

> The earth and water and the natural resources contained within them are to be controlled by the state and used for the greatest possible prosperity of the people.

For the Court, coastal areas and the natural resources within the ambit of them clearly fell within Article 33(3). Following a line of cases (discussed in Chapter 18), the Constitutional Court held that the state had relinquished the requisite control over coastal resources by allowing these licences to be issued. Importantly, the Court also seemed to find that Article 33(3) imposed upon the state an obligation to protect the pre-existing rights of traditional communities.[97] According to the Court, when exercising control under Article 33(3), the state must:

> observe existing rights, both individual and collective, held by customary law communities, the rights of customary law communities and other constitutional rights held by the community and which are guaranteed by the Constitution, such as the right to access to pass through, the right to a healthy environment, among others.[98]

The Court also emphasized that the main purpose of the state exercising control over natural resources under Article 33(3) was to ensure the 'prosperity of the people'. For the Court, this prosperity was not achieved when the state deprived people of the natural resources upon which they relied for their subsistence needs and livelihoods. In a similar vein, the Court also decided that, by allowing these concessions, the state failed to meet its obligation to advance public welfare and social justice. The Court appeared to impute this obligation from a passage in the Preamble to the Constitution, which reads:

> the purposes of establishing the state of Indonesia include to protect the entire nation … to advance public prosperity, to enlighten the life of the nation, and to participate in realising a world order based on independence, civilized peace, and social justice.

The concessions also violated Article 34(2) of the Constitution ('The state is to develop a social security system for all people and is to empower weak and poor communities in accordance with human dignity'). The Court saw Article 34(2) as encompassing economic democracy or 'togetherness', which required:

> that when running the economy, including the management of natural resources for economic benefit, the broadest possible cross-section of the community must be involved, and the prosperity of the people must improve. Management of natural resources must not merely observe principles of efficiency to obtain maximum profits, which can advantage a small group of capital owners, but rather must be able to increase the prosperity of the people in a just fashion.[99]

In the Court's estimation, the concessions would likely do the precise opposite. That is, they would result in, first, concessions being managed by 'large capital owners' and, second, the exclusion of traditional fishing communities who relied 'for their lives and livelihoods' on coastal resources. This also breached Article 28A of the Constitution ('Every person has the right to live and the right to maintain their life and livelihood').

In the *Coastal and Remote Areas Law* case, the Court mentioned Article 18B(2) but did not give it much consideration, relying on other constitutional provisions to invalidate the concessions. However, in a similar case decided only several months later—the *Plantation Law* case (2011)—the Court appeared to 'switch' to using Article 18B(2). This case was brought by citizens who lived on, and maintained, land over which the state had awarded concessions for plantations.[100] Article 9(1) of the 2004 Plantations Law authorized the state to issue these concessions. Traditional community members had apparently continued to use that land and had been threatened by concession-holders with Article 21 of the 2004

[97] *Coastal and Remote Areas Law* case, para [3.14.4]. [98] ibid para [3.15.4].
[99] ibid para [3.15.9].
[100] Law 18 of 2004 on Plantations. This Law has since been replaced by Law 39 of 2014 on Plantations.

Plantations Law, which, inter alia, prohibited people 'using plantation land without permission'. The elucidation to Article 21 defined this as 'occupation of land without permission of the owner in accordance with the law'. Article 47(1) imposed a maximum five-year prison sentence and a Rp 5 billion fine for deliberately violating Article 21.

The Court invalidated Articles 21 and 47 on several grounds.[101] One was that they breached 'the recognition and respect for adat communities and their traditional rights' required by Article 18B(2). The Court observed that many disputes had arisen, because of the:

> lack of a clear boundary between *hak ulayat* and other *adat* rights and new rights granted by the state.… [I]n these circumstances, it is not 'appropriate' (*tepat*) for criminal penalties to be applied to those who occupy land in accordance with their customary law. *Adat* rights exist on an ipso facto basis. If someone clears, works and harvests land … intensively for a long time, then the relationship between that person and the land intensifies [and vice versa]. However, new rights, in the form of the right to cultivate or use are granted on an *ipso jure* [by operation of law] basis … It is now appropriate for the protection of *adat* community rights—as traditional rights that still exist and accord with community developments within the framework of the unitary Republic of Indonesia—to materialize, so that Article 18B is capable of assisting traditional communities that are increasingly marginalized …

In the *Coastal and Remote Areas Law case*, the Court did not clearly explain the application or scope of Article 18B(2), nor how it operated vis-à-vis other constitutional rights. The Court did, however, fill in some of these gaps in its most significant case about adat rights: the *Traditional Forest Community* case (2013).

Traditional Forest Community case (2013)

This case was brought by AMAN, along with two customary law communities whose representatives claimed the state had ignored their customary rights to forests, thereby contravening Article 18B(2). The state had done this by categorizing 'customary forest' as 'state forest'. This enabled it to grant commercial concessions to exploit those forests—or even to permit them being cleared for industries such as mining and plantations—without consulting the traditional community that had long used or occupied the forest, let alone compensating that community. The result was that traditional communities were being excluded from forestry resources they had accessed for generations.[102]

The legal bases for this government action were two provisions of the 1999 Forestry Law. Article 1(f) of the Law defined adat forest as 'state forest located in the areas of an adat community'. Similarly, Article 5(2) stated that state forest can 'take the form' of customary forests. Article 5(1) declares that there are only two types of forests: state forest (*hutan negara*) and forests over which concessions or rights have been granted (*hutan hak*).

The Court took the view that Article 18B(2) of the Constitution gave traditional communities the right to recognition and to have their traditional rights protected as constitutional rights.[103] The 1999 Forestry Law contradicted this, and was also contrary to one of the main purposes of the state mentioned in the Preamble to the Constitution: achieving welfare for all people. This, of course, included those living in traditional communities who relied upon natural resources for their daily needs. By including customary forest as part of

[101] The applicants also argued that Art 21 was so loosely worded that it could encompass almost any activity. The Court agreed, finding that it caused 'legal uncertainty', which breached Art 28D(1) of the Constitution ('Every person has the right to legal recognition, guarantees, protection and certainty which that is just, and to equal treatment before the law') and even the rule of law (*negara hukum*) itself. It also found that matters relating to the use of land without permission were not criminal matters but rather were civil matters that should be resolved using deliberation and consensus rather than the criminal penalties that Art 47 imposed.

[102] *Traditional Forest Community* case, para [3.13.1]. [103] ibid para [3.12.1].

state forest, the Forestry Law had ignored the traditional rights of adat communities who relied on forests for their livelihoods. The Court saw this as unjust and held that it left traditional communities vulnerable. In the words of the Court:

> Customary law communities occupy a weak position because their rights are not clearly and firmly recognised when up against the state with very strong control. State control over forests should in fact be used to allocate natural resources justly in the interests of the greatest possible prosperity of the people.[104]

While the state retained full control to regulate and grant concessions over state forests, in customary forests its control was limited by the customary law of the forest community occupying or reliant upon the forest. Customary forests, the Court said, were governed by the *hak ulayat* of that forest community. The Court continued:

> The members of a traditional community have the right to clear their customary forests and to control and use them to fulfil their individual needs and those of their families. Therefore, it is not possible for the rights held by customary law community members to be extinguished or frozen, provided that they meet the requirements of a traditional community as referred to in Article 18B(2) of the Constitution.[105]

In the event, the Court decided that these provisions violated the rights of the applicants and the members of traditional communities in similar circumstances. The Court therefore removed the word 'state' from Article 1(f), so that it now defines adat forest as 'forest located in the area of an adat community'. The Court recast Article 5(1) to clarify that 'state forest' did not encompass adat forest and invalidated Article 5(2) altogether.

FALSE HOPE? THE RECOGNITION PROBLEM

In the *Plantations, Coastal Resources*, and *Traditional Communities* cases, the Court identified at least four constitutional bases to uphold traditional rights. Article 18B(2) appears to be most directly applicable in these cases, because it specifically requires the state to protect the rights of traditional communities. However, the Court has also employed Article 33(3), the Preamble, and Article 28A to invalidate legislation that ignores traditional rights. By so doing, it has emphasized that the state has an obligation to ensure the welfare of the community, including adat groups. The state breaches this obligation when it grants concessions that fence off the natural resources upon which local communities have long depended.

At first glance, constitutional recognition of adat rights might appear to be a considerable advance for the position of adat in Indonesia's legal system: for the first time, adat appears no longer to be susceptible to government override. Some lawyers and NGOs have even claimed that the *Traditional Communities case* has elevated *hak ulayat* above the laws of the state. Buoyed by the decision, some NGOs—including AMAN—have been mapping traditional adat community entitlements in anticipation of challenging concessions the government has awarded.[106]

These decisions will, however, probably not lead to increased recognition of the land and resource-related rights of Indonesian traditional communities, at least in the short term. This is for two sets of reasons. The first are the formal limitations on the Constitutional Court's powers, some of which were discussed in Chapter 5. In particular, the Court has no formal powers of enforcement and its decisions operate only prospectively, so any concessions or other rights already awarded under statutory provisions the Court subsequently

[104] ibid para [3.12.4]. [105] ibid para [3.13].
[106] 'Pendaftaran Wilayah Adat Belum Jelas' *Hukumonline* (16 April 2010).

invalidates remain valid. This means that traditional communities will probably continue to be excluded from natural resources until these concessions expire.

The second set of reasons relate to the fact that, in practice, only 'recognized' traditional communities can enjoy legal recognition and protection. Article 18B(2) itself requires that traditional communities must 'still exist' and accord with both 'community developments' and 'the principle of the unitary Republic of Indonesia'.[107] As mentioned above, similar requirements have been included in various statutes on natural resources issued in the post-Soeharto period and in the 2014 Village Law. In the *Plantations Law* case, the Court pointed to provisions in the 2004 Plantations Law that set out almost identical requirements for recognition.[108] It referred to similar requirements in the Forestry Law in the *Traditional Communities* case: the community must exist in its traditional form; have institutions and a leader; occupy a defined area; and have a legal infrastructure, including a customary law court to which its members adhere. The surrounding forest area must also be traditionally harvested to fulfil the daily needs of the community.

Most significant, however, is that a local government must, under Article 67(2), issue a regional regulation (Perda) to legally recognize the community before that community can exercise these rights. The applicants in the *Traditional Forest Community* case had been so recognized[109] but most traditional communities will find it difficult to convince their local governments to do the same. This is because issuing concessions will usually be in the financial interests of local governments. They will, therefore, be reluctant to recognize a traditional community if this will automatically extinguish their authority to issue concessions.

In late 2016, small but significant progress was made in the recognition of the land rights of traditional communities. In a ceremony at the Presidential Palace on 30 December, President Joko Widodo formally handed 13,100 hectares of land to nine communities.[110] This is part of Widodo's plan to eventually grant 12.7 million hectares to traditional communities.[111]

[107] *Coastal and Remote Areas Law* case, para [3.13]. [108] Elucidation to Art 9(2).

[109] The first applicants had been recognized by Kampar Country Regulation 12 of 1999 on Ulayat Land; the second applicants by Lebak Regent Decision 430/Kep.318/Disporabudpar/2010.

[110] 'Jokowi Grants First-Ever Indigenous Land Rights to 9 Communities' *Mongabay.com* (4 January 2017) <https://news.mongabay.com/2017/01/jokowi-grants-first-ever-indigenous-land-rights-to-9-communities/>.

[111] Ihsanuddin, 'Jokowi: 12,7 Juta Hektar Lahan Hutan Akan Dibagikan Kepada Masyarakat' *Kompas* (30 December 2016) <http://nasional.kompas.com/read/2016/12/30/12040991/jokowi.12.7.juta.hektar.lahan.hutan.akan.dibagikan.kepada.masyarakat>.

8

Land Law and Forestry

INTRODUCTION

The 1960 Agrarian Law (BAL)[1] is Indonesia's principal legislative instrument governing land and the rights that can be exercised over it, and their registration or recognition. This umbrella statute is far from comprehensive, however. It has required supplementation by a myriad of subordinate legislation, including regulations issued by the Ministry of Agrarian Affairs and the National Land Agency (*Badan Pertanahan Nasional*). This has resulted in an uneven patchwork of ad hoc regulation and much legal uncertainty. This complexity—and the confusion it creates—are common features of many areas of law covered in this book but land law is arguably more problematic than most others. This is because this national legal regime does not exclude *adat* law (see Chapter 7), which can still influence land entitlements and ownership, even though there is much uncertainty about the precise extent of its application. Decentralization has also added significant complexity and jurisdictional confusion, as subnational governments vie to regulate and administer the land within their boundaries.

It is also important that around 70 per cent of Indonesia has been categorized as 'forest estate' (*kawasan hutan*), and has, therefore, traditionally been administered by the Ministry of Forestry.[2] Although non-privately held forested lands are not strictly 'owned' by the state through the Ministry, the Forestry Law specifies that the Ministry controls them.[3] As discussed below, recent reforms—including decentralization, structural changes to the Ministry, and decisions of the Constitutional Court—appear to have loosened what had previously been the Ministry's almost absolute stranglehold on the sector.

AGRARIAN LAW: REGISTRABLE RIGHTS

The National Land Agency (*Badan Pertahanan Nasional*, BPN) was established in 1988 as the central office for land administration. The Agency has its head office in Jakarta and branch offices across Indonesia. It grants and extends land use permits. It also manages transfers and a land titling and registration system.

Only rights applying to the surface of the land are capable of registration (Article 4).[4] The Agrarian Law establishes various such rights, including: ownership; use (whether commercial or for building); lease (including of farming lands); conversion; forestry; and produce profit-sharing (Article 53). It also provides for water usage, cultivation, fishing, and

[1] Law 5 of 1960 on Agrarian Law. This Law is commonly referred to as the 'Basic Agrarian Law' or BAL, and we use this acronym in this chapter.

[2] Adriaan Bedner, 'Indonesian Land Law; Integration at Last? And for Whom?' in J McCarthy and K Robinson (eds), *Land and Development in Indonesia* (ISEAS-Yusof Ishak Institute 2016) 70. As discussed later and in Chapter 9, the Forestry Ministry has now merged with the Environment Ministry.

[3] The percentage of overall land that the Indonesian state claims to control—around 70 per cent—is one of the highest in Asia (compared to 53 per cent in the Philippines, 68 per cent in Sri Lanka, 40 per cent in Thailand, and 23 per cent in India): KC Bell, S Shivakumar, and J Martinez, 'Reforming Indonesia's Complex Legal Environment for Land Governance: Complementary Top-down and Bottom-up Approaches' *Annual World Bank Conference on Land and Poverty* (Washington DC 2013) 12.

[4] Indonesian law does not generally provide for layering multiple land use rights within a single area, such as maintaining separate ownership of mining, forest, or marine rights relating to one plot of land. However, as discussed below, the overlay of rights does occur in practice.

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airspace rights (Article 16(2)). Many of these rights can be cancelled if the land is neglected or not used for the purposes of the right.[5]

Ownership rights (*hak milik*)

This right resembles freehold. It is the strongest and fullest title available to individuals, and can be held in perpetuity (Article 20(1)).

Hak milik can be transferred, annulled, or encumbered by registration (Articles 19–20, 23, 25) and can extend to permanent fixtures on the land. While registration provides 'strong evidence' of the validity of ownership, this can be refuted by stronger evidence.

Only Indonesian citizens, and particular types of Indonesian legal entities can hold *hak milik* (Article 21(1)). These legal entities are described in Government Regulation 38 of 1963 and include state-owned banks, farmers' cooperatives established under Law 79 of 1958, religious institutions, and social welfare institutions.[6] Foreign individuals and foreign commercial entities generally cannot hold *hak milik*. Those not able to own land must instead rely on weaker forms of land rights—such as general use rights, commercial use rights, and building rights.[7]

Article 50(1) of the Agrarian Law specifies that ownership rights can only be regulated by legislation, while government regulations can be used for other rights (Article 50(2)).

Cultivation rights (*hak guna usaha*)

This right allows cultivation of state land—whether for farming, fisheries, or livestock (Article 28(1))—on a plot of at least five hectares.[8] It can be held by Indonesian citizens and legal entities established under Indonesian law and domiciled in Indonesia (Article 30(1)), including foreign companies. This right must be registered and lasts for twenty-five years,[9] further extendable by twenty-five years (Articles 29, 32(1)). It can be used as security (Article 33) or transferred during the period of its validity. This usually takes place through a sale and purchase agreement in the form of a notarial deed, which should then be registered at the local National Land Agency office.[10]

Building rights (*hak guna bangunan*)

This right is often used by businesses engaged in office- or factory-based activities, as opposed to agricultural activity. Building rights allow a party to establish, own, and use buildings upon land owned by another (Article 35(1)). The land can be government-owned (in which case the right is established by government decision) or privately held (in which case establishment is by private agreement between the owner and the builder or occupier) (elucidation to Article 35).

[5] See, for example, Art 27(a)(3) for ownership rights; Art 34(e) for commercial use rights; and Art 40(e) for building use rights; elucidation to Art 27.

[6] This only applies to religious and social institutions granted permission by the Minister of Agriculture following advice from the Minister of Religious Affairs or Minister of Social Affairs, respectively. See Art 1, Law 79 of 1958 on the Designation of Legal Entities that May Hold Ownership Rights Over Land.

[7] As discussed below, a commercial entity can own a building on land owned by another.

[8] If the land is greater than twenty-five hectares, then the right holder must have technical expertise in accordance with contemporary developments (Art 28(2)).

[9] According to the Law, cultivation rights are provided for a maximum of twenty-five years, although thirty-five years can be granted 'if the corporation needs more time' (Art 29(1)(2)).

[10] Art 16, Government Regulation 40 of 1996 on Cultivation Rights, Building Rights and Usage Rights to Land.

This right initially lasts up to thirty years (Article 35(1)), is extendable by twenty years, and can be renewed (Article 35(2)) and transferred (Article 35(3)). Like the *hak guna usaha*, the right must be registered, and it can be held by Indonesian nationals and Indonesia-domiciled legal entities established under Indonesian law, including foreign companies (Articles 19, 36, and 38). Also like the *hak guna usaha*, transfers are generally effected by sale and purchase agreement by notarial deed, registered at the relevant Land Agency office.[11]

Usage rights (*hak pakai*)

This right allows use of, or obtaining produce from, land under private or state ownership (Article 41). It may be for a particular time or purpose (Article 41(2)(a)), as specified by contract (for private land) or government decision (for state land). The right can be extended without or with financial recompense, or for payment in kind (Article 41(2)(b)).[12] The right can be transferred but requires prior permission of the landowner (for private land) or the relevant authorizing officer (for state land) (Article 43(1)–(2)). Again, this right can be held by Indonesian citizens and foreigners residing in Indonesia, and legal entities, including foreign entities with representation in Indonesia (Article 42).

Leasehold (*hak sewa*)

Land owners can grant this right to others to use their land and/or the buildings upon it in return for rent, which can be paid up front or periodically (Article 44(1)–(2)). Again, Indonesian citizens, foreigners residing in Indonesia, Indonesian legal entities, and foreign legal entities with representatives in Indonesia can obtain this right (Article 45). Indonesian law does not comprehensively regulate the rights and obligations of landlords and tenants. Government Regulation 44 of 1994 on Occupation of Housing by Non-Owners remains the most relevant legal instrument governing this relationship. It stipulates that where rent is paid monthly, rental prices must be set for a minimum twelve-month period (Article 18). The regulations also prohibit sub-leasing unless approved in writing by the owner (Article 9(1)).

Strata title

Strata title (*hak milik atas satuan rumah susun*) was created to provide for multi-occupancy use and development in 1985[13] and is regulated by Law 20 of 2011 on Apartments. This Law recognizes four types of apartments: public apartments, state apartments, commercial apartments, and special apartments (Article 13(2)). Apartments can be built on land with *hak milik* status, state land in respect of which building or usage rights are held, and land in respect of which building rights or usage rights over management rights *(hak pengelolaan)* are held (Article 17).[14] Any individual who fulfils the requirements to hold rights over land may hold a certificate of strata title, which is published by the relevant county or city land office (Article 47). Foreigners with an appropriate stay permit can hold strata title. This is discussed further below.

[11] Art 34, Government Regulation 40 of 1996 on Cultivation Rights, Building Rights and Usage Rights to Land.

[12] Commonly, land holders tend to grant usage rights for twenty-five years with the possibility of renewal, subject to specific limitations.

[13] Law 16 of 1985 on Apartments.

[14] Public and special apartments can also be built using state-owned land and/or land from religious endowments (Art 18).

Securities

Article 25 of the Agrarian Law states that ownership rights can be used as security for debts using a mortgage instrument. However, it provided no regulatory detail on securitization procedures. In 1996, the national legislature enacted the Securities Law,[15] which allowed for the registration of securities but only over ownership, commercial use, and building rights (Article 4(1)).

A registered security provides 'the strongest evidence' that its holder can claim preference over other creditors, unless the government has a legitimate claim, such as unpaid tax liabilities. A single object may be subject to multiple mortgages and the priority of security is based on the date each mortgage is issued (Article 5). If the debtor defaults on the agreement, the mortgagee can sell the object of the mortgage by public auction and take the amount owed from the proceeds (Article 6). One of the major shortcomings of this Law is that it does not set out a right to possession—and therefore the auctioning of securitized property in the case of default can be difficult.[16]

Land rights and foreigners

As mentioned, the rights available to foreigners who reside in Indonesia, or foreign companies established in Indonesia, are largely limited to land use rights (Article 42) or leasehold rights (Article 45).

The prohibition on foreigners and foreign entities owning land is strictly applied. Violation will usually result in loss of the relevant land rights and their transfer to the state. So, for example, Indonesians who lose their citizenship must transfer any ownership rights over land within one year. If they do not, their ownership rights pass to the state, although any other rights associated with that land that foreigners can hold, remain (Article 21(3)). Another consequence of the prohibition is that any transfer of ownership rights to a foreign citizen, or to an Indonesian citizen who also has foreign citizenship, is legally invalid and the land in question automatically transfers to the state (although, again, any rights associated with the land that foreigners can hold will continue to exist) (Article 26(2)).

Under Government Regulation 103 of 2015 on Ownership of Residences by Foreigners Domiciled in Indonesia, foreigners can own a residence if their presence 'brings benefit, [or] they conduct business, work or invest in Indonesia' (Article 1(1)). Foreigners may own residences through usage rights (Article 2(1)). This applies to houses established on land with usage rights, with usage rights governed by contract (Article 4(a)(1)), or strata property built on land with usage rights (Article 4(b)). The Regulation allows foreigners to hold usage rights over new homes, and ownership rights (*hak milik*) over new apartments established on land with usage rights (Article 5). The period of ownership for homes is a maximum of eighty years (an initial thirty years, which can be extended by twenty years, and then renewed for another thirty years) (Articles 6 and 7). To maintain ownership, foreigners must remain in Indonesia. If they leave, then they have one year to transfer the right (Article 10(1)). If they do not complete the transfer within that time, the land is auctioned by the state (if the building was built on state land) or reverts to the owner of the land (in the case of a private contract) (Article 10(2)).

A ministerial regulation[17] sets minimum prices for houses and apartments that foreigners may purchase. In Jakarta, for example, foreigners are only permitted to purchase houses

[15] Law 4 of 1996 on Securities.

[16] Jude Wallace, 'Indonesian Land Law and Administration' in Tim Lindsey (ed), *Indonesia: Law and Society* (2nd edn, Federation Press 2008) 211–12.

[17] Art 5(1), Joint Regulation of the Minister of Agrarian Affairs and Spatial Planning and Head of the National Land Agency 29 of 2016 on Procedures for Providing, Releasing or Transferring Ownership Rights over Houses or Residences for Foreigners Living in Indonesia.

worth Rp 10 billion or more and apartments worth Rp 3 billion or more. Foreigners are also limited to owning one plot of land per person/family up to 2,000 square metres. Purchasing larger plots of land requires ministerial approval.[18]

Some foreigners who wish to own land have sought to use an Indonesian citizen as a 'nominee', who holds the freehold title on behalf of the foreigner. Such nominee arrangements usually involve private contracts but their legal validity and enforceability are very dubious, as they are entered into with an illegal purpose: to avoid the rules that limit the land rights available to foreigners. Whether nominee arrangements are complied with usually depends, in practice, on the foreigner maintaining good relations with the nominee.

Land registration

The Agrarian Law also established a national land registration system, under which building rights, commercial use rights, and ownership rights can be registered (Articles 19, 23(1), 32(1), and 38(1)). The primary aim of the system is to create legal certainty through relatively straightforward processes (see Part IV, General Elucidation; and the elucidation to Article 19). Despite this, as mentioned, registration and land certificates can provide only 'strong evidence' of ownership or entitlement, not definitive proof, and they can be challenged by evidence proving that another party is the legitimate owner. This is necessary given that much of the data on the register is suspected to be inaccurate or even fraudulent. The type of evidence that can be used for such a challenge includes a Land Statement (*Surat Keterangan Tanah* or *girik*), issued by a local village head, which indicates that tax is paid for use of the land. In some cases, courts have accepted this as better evidence of ownership than a formal certificate and accompanying registration.[19]

Registering land for the first time is also administratively complex and time-consuming,[20] as is registering land acquisitions in most major cities. It requires: (1) land certificate examination at the local land agency office; (2) paying a transfer tax; (3) paying a tax on acquiring land and buildings; (4) execution by a land conveyance official (*Pejabat Pembuat Akta Tanah*, PPAT) of the deed for sale and purchase of the land; (5) registration of the land deed with the local land agency office; and (6) registering the deed at the Land and Building Tax Office under the name of the new owner. The complexities and associated costs are said to discourage use of the registration process,[21] as does the uncertainty resulting from poor coordination between central and local state agencies responsible for surveying, mapping and zoning:

> Registration remains notoriously slow, Kafkaesque in its intricacy, and commonly exploited by corrupt … officials. [It] can involve many years, and expenses, both legitimate and illegitimate, which commonly consume much of the value of the transaction.… The quite rational result is … that most transactions are not registered and … land disputes are common.[22]

More than half a century after the Agrarian Law's enactment, the 30 per cent of land categorized as non-forested contains around 85.8 million land parcels but fewer than half of

[18] Art 5(2), (3), Joint Regulation of the Minister of Agrarian Affairs and Spatial Planning and Head of the National Land Agency 29 of 2016 on Procedures for Providing, Releasing or Transferring Ownership Rights over Houses or Residences for Foreigners Living in Indonesia.

[19] Bedner (n 2) 66. [20] Government Regulation 24 of 1997 on Land Registration.

[21] John McCarthy and Kathryn Robinson, 'Emerging Options for the Recognition and Protection of Indigenous Community Rights in Indonesia', J McCarthy and K Robinson (eds) *Land and Development in Indonesia* (ISEAS-Yusof Ishak Institute 2016) 16.

[22] Tim Lindsey, 'Square Pegs and Round Holes: Fitting Modern Title into Traditional Societies in Indonesia' (1998) 7(3) *Pacific Rim Law and Policy Journal* 700, 710.

these have been registered.[23] Around half of the remaining land is held without official legal documentation, particularly in more rural areas,[24] and so is dealt with outside the formal registration system.

State land acquisition

Article 18 of the Agrarian Law allows land rights to be converted to state rights, if necessary for 'the interests of the nation, the state and the people as a whole'. The same provision requires that appropriate compensation be provided, in accordance with statute.[25] As Article 6 of the Agrarian Law states, all land rights have a 'social function', which, according to its elucidation, means that 'individual rights must be balanced with community interests'.

Indonesia's primary legislative instrument on state land acquisition is Law 2 of 2012 on Land Acquisition for Development for the Public Interest (the Acquisition Law). This statute allows acquisitions in the public interest, including for:

a. national security and defence;
b. public roads, toll roads, tunnels, railways, train stations, and train operation facilities;
c. water towers, dams, dikes, irrigation and drinking water systems, sanitation systems, and other water disposal systems;
d. ports, airports, and terminals;
e. oil, gas, and geothermal infrastructure;
f. electric generators, transmitters, stations, networks, and distribution;
g. public telecommunication and information networks;
h. waste disposal and management sights;
i. public hospitals;
j. public safety facilities;
k. public gravesites;
l. social facilities, public facilities, and public green spaces;
m. natural and cultural heritage sites;
n. government offices;
o. administration of slum settlements or land consolidation, public rental housing for low income communities;
p. public schools and educational infrastructure;
q. public sporting infrastructure; and
r. public markets and public parking spaces (Article 10).

Compared with the regulatory framework it replaces, the 2012 Acquisition Law provides clearer, time-bound procedures for land acquisitions, independent land valuations, and increased protection for land right owners by providing them with the option to appeal administrative decisions to the courts. Specifically, the Acquisition Law requires that

[23] Bedner (n 2) 66; Chip Fay and Ho-Ming So Denduangrudee, 'Emerging Options for the Recognition and Protection of Indigenous Community Rights in Indonesia' in J McCarthy and K Robinson (eds), *Land and Development in Indonesia* (ISEAS-Yusof Ishak Institute 2016) 92.

[24] Wallace (n 16) 195.

[25] Other provisions cover how specific rights can be annulled. For example, Art 27 specifies that ownership rights are subject to Art 18, voluntary relinquishment and invalidation for neglect or contravention of foreign ownership restrictions (see Art 21(3) or 26(2)). Arts 34 and 40 specify that usage and building use rights can be revoked in the public interest.

acquisition be based on a development proposal, survey data, and public consultation (Article 16). According to Article 6 of Presidential Decision 71 of 2012, which implements the Acquisition Law, the development proposal must include: a social economic survey; a location feasibility study; a cost and benefit analysis for the county and community; estimated land values; and a social and environmental impact study of the proposed acquisition and development. Directly and indirectly affected communities must be informed of the proposal (Article 17 of the Acquisition Law).[26]

Land right holders and affected communities must also be consulted, to reach agreement about the proposed development location. Sixty days must be allocated for public consultation, though this can be extended by a further thirty days if parties object to the development (Article 20(1) of the Acquisition Law). If, after these consultations, these objections have not been resolved, the authorities seeking to acquire the land must report the objections to the local governor for further investigation by a team,[27] which must hold discussions with the objectors and then recommend whether their objections should be accepted (Article 21(4)).[28] 'Based on' the team's recommendation, the governor can either reject or approve the development (Article 22), although it is unclear whether the Law strictly requires the governor to follow the team's recommendations. The governor's decision can be appealed to the relevant administrative court and up to the Supreme Court, which must issue a decision within specified timelines (Article 23).

If the land acquisition is approved, the land acquisition process can begin. This involves: surveying, identifying, and recording land control, ownership, use, and benefits; assessing, negotiating, and paying compensation; and handing over the land (Article 27(2)).[29] Of course, this process can be controversial, especially when owners and occupiers lack formal certificates to evidence their land interests, thereby weakening their negotiation positions. However, Articles 25(2) and 26 of Presidential Regulation 71 of 2012 specify some of the types of evidence that can be used for this purpose, including: receipts for instalments or payments for electricity, phones, and drinking water; and witness statements endorsed by other community members. Customary land rights are particularly susceptible to override during this process. To have their land entitlements recognized, customary communities must establish that they: still follow customary law and hold the land in accordance with that law; use the land for the everyday livelihoods of their members; and have a legal hierarchy for the administration, control and use of the communal land that the community follows (Article 22(1) of the Presidential Regulation).

Compensation must be 'fair and appropriate' (Article 9(2) of the Acquisition Law), and is negotiated after the land agency provides an initial estimation (Article 34(3)), based on a valuation by an independent professional.[30] Compensation can be money, replacement land, re-settlement, share ownership or any other form agreed by both parties (Article 36 of the Acquisition Law). It covers land, spaces above or below the ground, buildings, plants, fixtures, and or other forms of assessable loss (Article 33). If

[26] Details of the procedural requirements for informing communities are contained in Presidential Decision 71 of 2012.

[27] The investigation team consists of the provincial regional secretary or official appointed to represent the government, the head of the district National Land Agency office, the agency who handles development planning, the district head of the Ministry of Law and Human Rights, the regent/mayor or representative, and an academic (Art 21(3), Law 2 of 2012).

[28] The team must make this decision within fourteen days (Art 21(5), Law 2 of 2012).

[29] However, if the land is less than one hectare, the procedural requirements can be bypassed, and the government can negotiate for direct acquisition with the relevant owner/s (Art 121, Government Regulation 71 of 2012).

[30] Art 32(1), Law 2 of 2012 and Art 1(11), Government Regulation 71 of 2012.

agreement on compensation cannot be reached, stakeholders can bring the matter before the district court and can further appeal to the Supreme Court, which, again, must resolve the case within specified time limits (Article 38).

The state has long been criticized for failing to fairly compensate those whose land has been acquired, and for using its powers to expropriate property 'to serve private rent-seeking interests'.[31] Negotiations are often said to be marred by intimidation and pressure, forcing land owners to accept compensation well below market value.[32] Famously, both underpayment and intimidation were said to have occurred when the state expropriated over 60,000 hectares of land to build the Kedungombo Dam in Central Java from the mid-1980s. Some villagers agreed, after pressure from the military.[33] Others refused the rate of compensation proposed by the government, which was well below market value. In 1987, the land was nevertheless transferred to the state and two years later the area began filling with water even though 1,500 families refused to leave their homes.[34]

Dispossessed villagers unsuccessfully sued the government in the Semarang District Court[35] and on appeal to the Semarang High Court.[36] However, on cassation, the Supreme Court upheld their claim and, controversially, increased a claim for compensation to a level beyond the amount the government had offered. This was partly because, the Court found, the government had not engaged in deliberations with some of the land holders regarding the rate of compensation, and so no consensus could have been reached, as required by law.[37] Ultimately, however, the Supreme Court overturned this decision in *peninjauan kembali* (or reconsideration) proceedings (a process discussed in Chapter 4). The Court found that most land owners had, in fact, agreed to the rate of compensation and, because land has a social function, it could be expropriated in the public interest.[38]

CUSTOMARY LAND RIGHTS

Prior to the Agrarian Law's enactment, Indonesia had a highly complex and pluralistic land law system. The first separate and distinct body of law was 'Western land law'. Regulated by the Dutch Civil Code, this included a system of hierarchical individualistic land rights. The second was adat or customary law, which, as discussed in Chapter 7, varies greatly across Indonesia. This division of law led, in turn, to a distinction between 'Western land' and 'Indonesian land'. Western land was subject to Western land rights, but could be held by foreigners, indigenous Indonesians, and 'foreign Orientals.'[39] Indonesian land was primarily subject to adat law.

The Agrarian Law aimed to put an end to this dualism.[40] It achieved this by replacing all Dutch and adat with the registrable rights discussed above, but stopped short of abrogating

[31] McCarthy and Robinson (n 20) 10.

[32] Daniel Fitzpatrick, 'Beyond Dualism: Land Acquisition and Law in Indonesia' in Tim Lindsey (ed), *Indonesia: Law and Society* (2nd edn, Federation Press 2008) 231.

[33] *In the Name of Development: Human Rights and the World Bank in Indonesia* (Lawyers Committee for Human Rights and the Institute for Policy Research and Advocacy 1995) 50–53.

[34] D Fitzpatrick, 'Disputes and Pluralism in Modern Indonesian Land Law' (1997) 22 *Yale Journal of International Law* 171, 200.

[35] Semarang District Court Decision 117/Pdt/G/1990.

[36] Semarang High Court Decision 143/Pdt/1991.

[37] Regulation of the Minister of the Interior 15 of 1975 on the 'Freeing' of Land, and Presidential Decision 55 of 1995 on the Procurement of Title, allow for land to be expropriated for development, provided that discussions and deliberations are held with the title holders and they accept the amount and form of compensation: Fitzpatrick (n 34) 199–200.

[38] 'Putusan Peninjauan Kembali Kasus Waduk Kedungombo' 112 *Varia Peradilan* 24.

[39] Sudargo Gautama and Budi Harsono, *Survey of Indonesian Economic Law Agrarian Law Report* (Lembaga Penelitian Hukum dan Kriminologi, Universitas Padjadjaran 1972) vii–viii.

[40] See General Elucidation of the BAL.

adat altogether. Article 5 of the Agrarian Law states that the 'land law applicable to the earth, water and sky *is* adat', or customary law (our emphasis).

However, this appears to have been nothing more than lip service, designed to legitimize law reform.[41] This is clear from Article 5, which greatly restricts the operation of adat land law, allowing it application only in very narrow circumstances where:

> it does not conflict with the national interest and the state, which is based on the unity of the nation, with Indonesian socialism, and with regulations contained in this statute and in other laws

Similarly, Article 2(4) grants customary law communities power to exercise control over land 'where necessary and not in conflict with national interests, according to government regulations'. Article 3 also states that customary rights can be implemented only: if they 'in fact exist'; accord with the national interest and national unity; and 'do not contradict laws and regulations of a higher order'. By operation of Article 5, then, any adat entitlements must give way to the land rights established by the Agrarian Law itself and if the national interest so requires.

The new rights established by the Agrarian Law also tend to contradict basic adat tenets. *Hak milik*, for example, is roughly equivalent to freehold and must be registered in the name of an owner or owners; this represents 'a radical departure from traditional Indonesian views on ownership'.[42] While adat communities recognize that the effort and capital put into a piece of land by an individual can create a personal tie between that person and the land, the primary adat equivalent of 'ownership' is the adat community's control as a group of the allocation and use of land (*hak ulayat*).[43] The concept of land ownership in the Agrarian Law has thus been individualized along western lines.

The Agrarian Law mentions *hak ulayat*, but makes it subservient to these new rights, by not making it registrable. The Law also states that *hak ulayat* must be adjusted to conform to the national interest[44] and, in fact, suggests that it has been an obstacle to regional development in the past.[45] The government has often interpreted this as treating all uncultivated *hak ulayat* land as state property, usually making payment of small amounts of 'recognition' money, if any, rather than the larger amounts required by the laws on compulsory acquisition.[46] More recently, local governments have been authorized to formally recognize *hak ulayat*,[47] but traditional communities have had trouble proving their entitlements.

Unfortunately, this marginalization of adat has done little to reduce the wider problems of dualism; rather, it has been a source of much conflict.[48] As Fitzpatrick explains:

> it is clear that adat law is cognisable only in the context of communal rights and obligations, which are underpinned by social processes of consensus, discussion and deliberation. Individualising and 'freezing' tenure through a process of registering Western-style rights

[41] MB Hooker, *Adat Law in Modern Indonesia* (Oxford University Press 1978) 115.

[42] ibid 118.

[43] Van Vollenhoven and Ter Haar actually denied that the *adat* rights of an individual could amount to 'ownership' in the European sense: ibid 119.

[44] Art 3, Agrarian Law.

[45] See explanatory memorandum, Part A, section 3, paragraph 2.

[46] Fitzpatrick (n 34) 186.

[47] Regulation of the Minister of Agrarian Affairs 5 of 1999. Home Affairs Minister Regulation 52 of 2014 on Guidelines for the Recognition and Protection of Customary Communities allowed district heads to form teams to recognize indigenous land claims without needing local legislative endorsement: Fay and Denduangrudee (n 23) 105. See also Minister of Agrarian Affairs and Spatial Planning and BPN Head Regulation 9 of 2015 on Procedures for the Determination of Communal Rights on Customary Land and the Land of Communities in Special Regions.

[48] Land disputes are a serious problem in Indonesia—they can, and frequently do, result in community violence and disrupt governance. According to the Consortium for Agrarian Reform, in 2016, there were at least 450 conflicts related to land disputes, more than one third of which arose in the plantations sector: Dani Prabowo, 'Konflik Agraria Naik Hampir Dua Kali Lipat Pada 2016' *Kompas* (5 January 2010) <http://nasional.

> threatens to break down this subtle interaction between individuals and their community … the registration of rights under the BAL is far more likely to lead to disputation, *de facto* pluralism, and ultimately the erosion of adat authority itself. This erosion will only accelerate as land acquires increased economic value under the pressure of industrialisation, urbanisation and population growth.[49]

FORESTS

As mentioned, much of Indonesia's landmass is categorized as 'forest estate' (*kawasan hutan*). Law 41 of 1999 on Forestry, as amended by Law 19 of 2004 (the Forestry Law), divides Indonesian forest areas into one of two types: forests that have rights or concessions awarded over them (*hutan hak*) (Article 1(5)); and the remainder, which are classified as state forest (*hutan negara*) (Article 1(4)). 'Indigenous forest' was defined as state forest within an indigenous customary law community (Article 1(6)). As discussed below, the Constitutional Court has now carved out a separate category for forests held by traditional communities.

The Law also establishes three categories of forest, distinguished by the functions or purposes for which they can be used under the Forestry Law and its various implementing regulations, discussed below. These are 'production forest', 'protected forest', and 'conservation forest'.

Article 1(7) defines 'production forest' as 'a forest area with the primary function of producing forest products'. In production forests, 'environmental services', timber and non-timber exploitation, and timber and non-timber resource harvesting can take place. Production forests are, therefore, the main forest areas used for industrial production of timber and agricultural products such as palm oil. Those seeking to engage in these activities require a permit (Article 28(2)). The specific permits mentioned are permission to: exploit forest areas (*izin usaha pemanfaatan kawasan*); exploit environmental services (*izin usaha pemanfaatan jasa lingkungan*); exploit timber (*izin usaha pemanfaatan hasil hutan kayu*) and non-timber products (*izin usaha pemanfaatan hasil hutan bukan kayu*); and to harvest timber (*izin pemungutan hasil hutan kayu*) and non-timber products (*izin pemungutan hasil hutan bukan kayu*).

'Protected forests' have the primary function of 'protecting life support systems, regulating water flow, preventing floods, controlling erosion, preventing sea water intrusion and protecting soil fertility' (Article 1(8)). Environmental protection services can be provided in these forests, and non-timber forest products can be harvested from them (Article 26(1)). However, the Forestry Law does not allow commercial logging in protected forests. A permit is required to perform these activities in protected forests (Article 26(2)).

Conservation forests are defined in Article 1(9) as forest areas with 'special characteristics', having the main function of preserving plant and animal diversity as well as ecosystems. Conservation forests that also contain life support systems are classified as 'nature reserves' (Article 1(10)); and nature reserves that also have non-depleting natural biological resources can be classified as 'nature conservation forests' (Article 1(11)). Hunting reserves are also categorized as 'conservation forests' (see Article 7).

The Forestry Law prohibits various activities, including:

- causing damage to the forest, even by concession or licence holders (Article 50(1) and 50(2));
- illegally working, using, or occupying forest territory (Article 50(3)(a));

kompas.com/read/2017/01/05/15230131/konflik.agraria.naik.hampir.dua.kali.lipat.pada.2016>. In 2012, 198 conflicts were linked to land disputes, resulting in at least twenty-five farmers being shot and three killed: Bell, Shivakumar, and Martinez (n 3) 16.

[49] Fitzpatrick (n 34) 188–89.

- clearing forest areas (Article 50(3)(b));
- burning forest areas (Article 50(3)(d));
- logging near various water sources (Article 50(3)(c));
- felling trees or harvesting forest produce without having a concession or permit from a relevant government official (Article 50(3)(e)); and
- receiving, buying, selling, trading, storing, or possessing forest produce that is known, or ought to be known, to have been illegally obtained or harvested from forest areas (Article 50(3)(f)).

Article 78 imposes significant terms of imprisonment and fines for breach of these prohibitions. For example, those who fell trees or harvest produce without a concession (thereby breaching Article 50(3)(e)) face a maximum of ten years' imprisonment and a maximum fine of Rp 5 billion.

Article 4(1) of the Forestry Law specifies that forests in Indonesia's territory and the natural resources contained within them are subject to state control. 'State control' is defined in Article 4(2) as: maintaining and managing all aspects relating to forests and forest products; designating which areas qualify as a forested area; and controlling the legal relationships between people and forests. This control has, for many decades, been exercised on behalf of the state by the Forestry Ministry. How it was exercised has always been controversial. Many suspect that it has been used largely to extract licence fees, both legitimate and illegitimate (making the ministry, its patrons and clients, and many of its employees very wealthy), rather than to achieve sustainable forest management and conservation.[50] However, in recent years this control has been loosened in numerous ways.

First, as discussed in Chapter 9, in 2014, President Joko Widodo merged the Ministry of Environment and Ministry of Forestry into the Ministry of Environment and Forestry.[51] This is said to have shifted the emphasis of environmental management and enforcement towards forestry, rather than the other sectors that fall within that portfolio, such as air and water standards and pollution. Likewise, because former forestry officials are now operating within a bigger ministry, rather than running their own ministry, they face new checks and balances. To be sure, forestry officials still wield significant control within the new structure, but their authority has, arguably, been dampened.

Second, regional governments have asserting a greater role in local forest management since the decentralization reforms discussed in Chapter 3 were introduced. As mentioned, after the enactment of the regional autonomy law many districts began exercising control over forest resources in their regions, distributing many logging and conversion permits.[52] This led to an overlaying of concessions provided by different levels of government, and permits being granted in areas that have been nationally designated as conservation zones. While the national government has clawed back some of this subnational authority with regional autonomy statutes enacted in 2004 and 2014, some lower-level governments have continued to assert it, whether they are formally entitled to do so or not. The national government has not been able to control many of these subnational governments, particularly because of the absence of effective mechanisms to resolve jurisdictional and other disputes between levels of government, as explained in Chapter 3.

[50] Bell, Shivakumar, and Martinez (n 3) 7.
[51] Presidential Regulation 16 of 2015 on the Ministry of Environment and Forestry.
[52] Christopher M Barr, *Decentralization of Forest Administration in Indonesia: Implications for Forest Sustainability, Economic Development, and Community Livelihoods* (Center for International Forestry Research 2006).

Third, the Constitutional Court unwound some of this control in two decisions about provisions of the 1999 Forestry Law, as amended in 2004. The first related to the Forestry Minister's relatively unbridled authority to both formally classify land as 'forested', and then to control that forest:[53] Article 1(3) of the Forestry Law appeared to allow the national government (in this case, the Forestry Ministry) to unilaterally designate (*menunjuk*) land as forest. It gave the Ministry power to control activities in state forests, including by issuing and managing licences for logging, forest plantations, and non-forestry uses.[54] Almost 90 per cent of 'forests' had been designated in this way.[55] The applicants in this case argued that Article 1(3) was so wide that it allowed the central government to allocate land as 'forest' even if that land was not, in fact, forested. The Forestry Ministry could also pursue those who illegally occupied or used land that it had designated as forest—a criminal offence under the Forestry Law—even if that land was not forest.[56] This left local people, including local governments themselves, beholden to the Forestry Ministry for permission to use the land so designated, including for community development and commercial endeavours.

The Constitutional Court decided that the Forestry Ministry cannot unilaterally nominate an area as forest, thereby obtaining control over it. Rather, nomination is simply one step in a formal rigorous process for determining whether particular land should be classified as forest. As the Court pointed out, these stages were set out in Article 15 of the Forestry Law, which stipulated designation as merely one of four steps required for land to be 'confirmed' or 'gazetted' (*pengukuhan*). The other three are adjustment, mapping, and formal allocation. The Court also decided that Article 1(3) breached the constitutionally enshrined notion of *negara hukum* (or 'rule of law'), because it allowed the Forestry Ministry to unilaterally designate an area as forest. The Court explained that state administrative officials cannot act arbitrarily but must instead act in accordance with the law and within their discretionary powers. According to the Court, designating an area as forest without involving forest area stakeholders was authoritarian.

In the second case, discussed in Chapter 7, the Court was asked to recognize adat rights over forested areas. The Court held that, when exercising its control over forests, the state must recognize the adat rights of indigenous communities.[57] While the state had 'full authority to regulate and decide upon the availability, allocation, exploitation, and administration of forests, and the legal relationships arising therein' regarding customary law forest, its authority was:

> limited by the customary law of the forest community. Traditional community forest (also referred to as kinship forest and sovereign forest, among others) is governed by *hak ulayat*, which exists within the territory of a single traditional community. Traditions are followed by its members, and the community has a central governing body with power over the entire territory. The members of a traditional community have the right to clear their customary forests to be controlled and used for the fulfilment of their individual needs and those of their families. Therefore, it is not possible for the rights held by customary law community members

[53] Constitutional Court Decision 45/2011 (21 February 2012).

[54] PN Wells and others, *Indonesian Constitutional Court Ruling Number 45/PUU-IX/2011 in Relation to Forest Lands* (Daemeter/TBI Indonesia/Makarim & Taira S 2012) 5.

[55] Giorgio Budi Indrarto and others, *The Context of REDD+ in Indonesia* (Center for International Forestry Research (CIFOR) 2012) 22–23.

[56] Wells and others (n 54) 6.

[57] Decision 35/PUU-X/2012. Although the *Traditional Forest Community* case is widely considered a 'landmark' case, it is certainly not the first time the Court has invalidated statutory provisions for breaching Art 18B(2) of the Constitution. Predecessors were Constitutional Court Decision 55/PUU-VIII/2010, reviewing Law 18 of 2004 on Plantations and the *Coastal and Remote Areas Law* case (2010).

to be extinguished or frozen, provided that they meet the requirements of a traditional community as referred to in Article 18B(2) of the Constitution.[58]

Although the precise implications of this decision are not clear, it can be interpreted as providing formal constitutional protection of *hak ulayat* and, therefore, prevents the state from simply awarding concessions or other rights over land, forested or not, without first consulting with indigenous communities. Following this decision, forested land within which a recognized customary indigenous community exists cannot be designated as state land but instead constitutes a separate category of forested land subject to rights (*hutan hak*), together with private rights held by individuals or other legal entities.

Nevertheless, this decision has not turned out to be the panacea for traditional rights protection that some had hoped for. This is because the state maintains authority in determining or 'recognizing' whether customary indigenous communities are, in fact, in existence. Article 67 of the Forestry Law already allows customary communities to collect forest product to fulfil daily needs and manage the forest in accordance with their prevailing indigenous law, provided they comply with state law. The Law also requires that forest-dependent communities in and around forests be compensated for loss of forest access (Article 68(3)). However, the Court's decisions did not affect the requirements for recognition as a 'traditional forest community' set out in the elucidation to Article 67 of the Forestry Law. These are that the community: exist in its traditional form; has institutions and a leader; occupies a defined area; and has a legal infrastructure, including a customary law court whose decisions its members follow. Likewise, the forest area surrounding the community must be traditionally harvested to fulfil the daily needs of the community. Most significant is the requirement that a local government must, under Article 67(2), issue a regional regulation (*Peraturan Daerah* or Perda) to provide legal recognition of the community. The applicants in these Constitutional Court cases met these requirements[59] but other communities might not find this easy to achieve. Some local governments are notorious for their lack of responsiveness to citizens' needs, making it difficult for traditional communities to convince their local governments to issue a regulation; or the recognition process might take significant time, allowing the government to issue concessions in the interim. Traditional communities are, however, likely to have the most difficulty convincing their local governments to formally recognize them by regulation if the local government itself wishes to award some type of permit, licence, or concession over the very land that those communities use.

Nevertheless, as discussed in Chapter 7, 2016 saw small but significant progress in the recognition of customary land rights. In a ceremony at the Presidential Palace, President Joko Widodo handed over 13,100 hectares to nine indigenous communities.

Case study: REDD+

Reducing Emissions from Deforestation and Forest Degradation (REDD)+ was once described as a 'win-win'.[60] On the one hand, it seeks to prevent deforestation and biodiversity loss from deforestation by creating incentives for those otherwise entitled to use forested and other lands to refrain from clearing it. If this deforestation can be avoided, so too can the release of carbon emissions from deforestation, which contributes significantly to

[58] *Traditional Forest Community* case 2012, para [3.13].

[59] The first applicants had had been recognized by Kampar Country Regulation 12 of 1999 on Ulayat Land; the second applicants by a Lebak Regent Decision (430/Kep.318/Disporabudpar/2010).

[60] This section draws on Simon Butt and others, 'Brazil and Indonesia: REaDD+y or Not?' in McDermott, Lyster, and Mackenzie (eds), *Law, Tropical Forests and Carbon: The Case of REDD+* (Cambridge University Press 2013); Simon Butt, Rosemary Lyster, and Tim Stephens, *Climate Change and Forest Governance Lessons from Indonesia* (Routledge 2015).

global warming. On the other hand, given that the areas with significant forest coverage often house communities that are socio-economically poor, REDD+ also promises to bring much needed funds for 'development', if the incentives to avoid deforestation can make their way to those communities.

Indonesia has long been considered a very promising site for REDD+ projects. As mentioned earlier in this chapter, Indonesia has forest reserves that are among the largest in the world, although they are rapidly diminishing. Estimates vary, but Indonesia has somewhere between 88 and 133 million hectares of forest, which comprises between 48 and 70 per cent of its territory[61] but it has lost somewhere between 25 to 40 per cent—around 40 to 60 million hectares—of its forest cover since the 1950s.[62] It is also one of the world's biggest greenhouse gas (GHG) emitters, largely because of deforestation and release of carbon from peatlands.[63] Reduction in deforestation would, therefore, significantly help to reduce these emissions.

Many of Indonesia's poor live in rural areas near or within Indonesia's forests.[64] These communities would likely benefit greatly from any financial payments made to avoid deforestation, potentially helping to lift them out of poverty. Depending on the GHGs prevented, Indonesia's former Special Presidential Advisor on Climate Change estimated that REDD+ revenues could reach US$15 billion per annum.[65] More conservative estimates anticipated US$765 million per annum for a 5 per cent reduction in GHG emissions, and US$4.5 billion for 30 per cent.[66] The money would come either from public funds or international carbon markets, where companies could purchase carbon credits from these communities, and then use them to offset their own emissions.

However, despite these anticipated benefits, and the apparent willingness of foreign governments and the private sector to invest in REDD+, it did not take off in Indonesia as initially predicted. Large scale pilots and dozens of small REDD+ projects have been run, some with limited success, in Central Kalimantan, East and West Kalimantan, South Sumatra, North Sumatra, Riau, Jambi, and Papua. However, the full potential of REDD+ has not been realized and is unlikely to be realized unless very significant structural problems with Indonesia's legal system in general, and its REDD+-related laws in particular, are resolved. We are very pessimistic about the prospects of this for many reasons, not least of which is that many forested areas are being cleared for palm oil plantations. Indonesia has developed into the world's largest exporter of palm oil, and the industry provides employment for millions of Indonesians living in rural areas. The long-term incentives that REDD+ offers pale in comparison with the short-term lure of palm oil.

Economic factors are not the only causes for concern. In 2009, the World Resources Institute identified seventeen good governance prerequisites for REDD. These included: effective law enforcement (particularly in relation to illegal logging and other forestry-related offences); an adequate legal framework for REDD+; clear land tenure systems; consistent

[61] See United Nations REDD website: <http://www.un-redd.org/UNREDDProgramme/CountryActions/Indonesia/tabid/987/language/en-US/Default.aspx>. For conflicting data, see Forest Watch Indonesia report: <http://fwi.or.id/english/?p=130>.

[62] World Bank, 'Pioneering Work on Reduced Emissions from Deforestation and Degradation (REDD) in Indonesia Shows the Way for a New Climate Change Mitigation Mechanism' <http://siteresources.worldbank.org/INTINDONESIA/Resources/226271-1113558711510/986166-1113558988434/REDD_overview.pdf.>.

[63] Erik Olbrei, 'Indonesia Sets a Carbon Time-Bomb' *The Conversation* (25 September 2013) <https://theconversation.com/indonesia-sets-a-carbon-time-bomb-17216>.

[64] Eva Wollenberg and others, 'Why Are Forest Areas Relevant to Reducing Poverty in Indonesia?' (2004) 4 CIFOR Governance Brief.

[65] Sunanda Creagh, 'Corruption Could Jeopardise Indonesia's Climate Change Deals' *Jakarta Globe* (17 September 2010).

[66] Christopher Barr and others, *Financial Governance and Indonesia's Reforestation Fund during the Soeharto and Post-Soeharto Periods, 1989–2009: A Political Economic Analysis of Lessons for REDD* (Center for International Forestry Research 2010).

policy over land use planning between government sectors involved in forest management; clear and enforceable revenue distribution and benefit-sharing mechanisms; and transparency and accountability in forest monitoring systems.[67] While Indonesia might have moved towards meeting some of these prerequisites, it has arguably fallen short of meeting them all. This makes it highly unlikely that large scale REDD+ projects will succeed in the long term and leaves those projects underway at risk of failure.

Corruption and illegal logging

As discussed in Chapter 14, corruption remains very high in Indonesia and, in particular, widespread corruption in the forestry sector, and illegal logging in conversation areas, are decades-old and notorious problems. By some accounts, corruption, including in the forestry sector, has only worsened since Soeharto.[68] Corrupt practices were said to be entrenched in the Forestry Ministry, and are suspected to have survived the transition to the new Environment and Forestry Ministry. Illicit revenue streams from licence fees and for turning a blind eye to illegal logging and other offences, give officials a vested interest in obstructing REDD+, which might otherwise close off this income. As mentioned, some newly empowered local government officials have also exercised any power they have over the forestry sector to increase their revenues, both legally and illicitly.[69]

Of course, the high levels of corruption within Indonesia's institutions of government has raised doubts about whether the funds obtained under REDD+ schemes will reach their intended beneficiaries: communities that have forgone forest exploitation. There are serious concerns that, if the government becomes involved in receipt and distribution of those funds, significant amounts will be illegally syphoned off. This has serious implications: not only are corrupt practices perpetuated but if communities do not receive the funds to which they are entitled, they are likely to ignore any agreement to refrain from deforesting.

Customary communities

REDD+ requires a reliable system of land tenure and that the rights and interests of traditional people and local communities be considered.[70] Indeed, REDD+ works on the assumption that it is possible to identify individuals and groups with entitlements to forested areas, and then to reward them to refrain from deforesting those areas. This is highly problematic in Indonesia. As mentioned earlier in this chapter, customary land occupies a particularly weak position vis-à-vis land that is formally titled and registered. As discussed in Chapter 7, adat also varies significantly from place to place. There is, therefore, significant variety among customary rules for determining who 'owns', or is entitled to use, a parcel of forested or other land, and for what purpose. Worse, because most adat is both unwritten and highly fluid, determining the content and scope of an adat rule can be difficult to achieve.

[67] Crystal Davis and others, *A Review of 25 Readiness Plan Idea Notes from the World Bank Forest Carbon Partnership Facility* (Working Paper, Washington DC, United States: World Resources Institute 2009) 2–3; Constance McDermott, 'REDD+ and Multi-Level Governance: Governing for What and for Whom?' in Lyster and Mackenzie (eds), *Law, Tropical Forests and Carbon: The Case of REDD+* (Cambridge University Press 2013).

[68] Simon Butt, 'Foreign Investment in Indonesia: The Problem of Legal Uncertainty' in Vivienne Bath and Luke Nottage (eds), *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge 2011).

[69] Barr (n 52) 111, 126.

[70] Glen Wright, 'Indigenous People and Customary Land Ownership Under Domestic REDD+ Frameworks: A Case Study of Indonesia' (2011) 7 *Law, Environment and Development Journal* 117; William D Sunderlin, Anne M. Larson, Amy E. Duchelle, Ida Pradnja Resosudarmo, Thu Ba, Huynh, Abdon Awono, and Therese Dokken, 'How Are REDD+ Proponents Addressing Tenure Problems? Evidence from Brazil, Cameroon, Tanzania, Indonesia, and Vietnam' (2014) 55*World Development* 37.

In a study on land tenure in Aceh, Dunlop found high levels of uncertainty and inconsistency in rules on the use of forest resources, even within short distances. Nevertheless, she found some consistencies between systems, at least when described with a high level of generality:

- land and forest ownership was largely communal rather than individualized;
- most systems only vaguely distinguished between use and ownership, if at all, with many communities giving permission to individuals or groups to use land for a specified time;
- 'outsiders' were usually prohibited from using community land;
- many systems permitted use of timber harvested from forests for particular purposes, including: daily needs, such as cooking, fences, and gardens; and community needs, such as building mosques;
- felling trees to clear land for agriculture and plantations was permitted if necessary for the livelihood of the local community;
- felling high-value species of wood for sale was permitted, although selling to outsiders was generally prohibited;
- using particular types of felled trees for specified purposes was permitted; and
- for environmental reasons, particular trees were prohibited from being felled, such as if they were located close to water sources.[71]

However, despite these apparent consistencies, Dunlop also found:

> high levels of uncertainty surrounding tenure and a lack of information at the community level about the land over which local communities claim customary rights. Differences of opinions about the application of laws, policies and customary laws also existed both between and within communities, government and academics.[72]

One implication for REDD+ of the general diversity and inconsistency of adat is that many different adat communities are likely to claim entitlements over any large forest tract identified for REDD+ purposes. Because of the variety of different customary laws adhered to by these communities, all the various adat rules must be identified and respected. In other words, it will be insufficient to identify the adat that applies to land use and entitlements in only one area and presume that it applies in other areas of the same forest area earmarked for REDD+. The entitlements under communities' adat, therefore, require separate determination.

In times past, disregard of unregistered community-held claims—notably, *hak ulayat* land—might not have presented insurmountable impediments to REDD+. The state could simply have ignored traditional entitlements to forests and issued concessions and permits as required, quelling discontent with threats of, and perhaps even actual, violence. However, in our view the state is no longer likely able to do this successfully. As discussed above and in Chapter 7, Indonesia's Constitutional Court has invalidated legislative provisions that failed to protect traditional forest community rights. We think the Court would likely do this again if a REDD+ scheme failed to respect those rights.

Without establishing ownership or entitlements, it will be impossible to obtain the prior informed consent of those affected by the project, discussed below. It might also be difficult to allocate any financial or other benefits arising from REDD+ to those who are entitled to it; and to hold anyone to account for failure to meet REDD+ obligations.

[71] Jane Dunlop, *REDD Tenure and Local Communities: A Study from Aceh, Indonesia* (International Development Law Organisation 2009) 32–42.
[72] ibid 10.

There is widespread concern that *adat* land rights and entitlements have been or will be ignored as land is allocated for REDD+. Impoverished rural communities face dispossession or exclusion from resources upon which they and their ancestors have relied for centuries for their subsistence. Concerns about 'cultural genocide' have even led the Central Kalimantan chapter of AMAN, the Indigenous Peoples' Alliance of the Archipelago, to call for an 'immediate moratorium on REDD+' in Central Kalimantan.[73] There are also reports of inadequate or absent engagement with affected local communities about plans to allocate land for REDD+, and failure to obtain prior informed consent.[74]

Forestry governance and jurisdictional conflict

As mentioned, democratization and decentralization has greatly complicated governance in Indonesia, as different institutions and tiers of government claim authority over a particular issue or area. For example, as discussed below, in 2011, former President Susilo Bambang Yudhoyono issued a regulation prohibiting logging in specified forests. This was directed towards national institutions: the Forestry, Home Affairs and Environment Ministers; the Heads of National Land Affairs, Spatial Planning, Surveys and Mapping Coordination Institutions; and members of the Presidential Development Monitoring and Control and the REDD Special Taskforce. The Ministry of Energy and Mineral Resources, the Ministry of Agriculture, and the powerful Ministry of Finance should be added to this list, given the relevance of their portfolios to forests. On any reading, this is a tangled web of overlapping and contested jurisdictions.

As discussed in Chapter 3, decentralization reforms embarked upon soon after Soeharto's fall transformed Indonesia from a highly authoritarian and centralized state to one that is democratic and decentralized.[75] Even though the 1999 Forestry Law, as amended, purports to leave the national government with authority to administer and regulate forestry issues, many of Indonesia's myriad local governments claim to have control of forest resources, including granting logging and other concessions.[76] They have sought to regulate REDD+ arrangements. There is confusion among REDD+ investors about which institutions or officials should be approached to negotiate their investments. Should they go to the Ministry of Forestry, which claims authority, or straight to local government at the site of the potential investment?

Despite sustained calls for many years by potential investors and environmental groups, REDD+-related national legislation has not been enacted. Without a national statute there have only been piecemeal, partisan, and uncoordinated regulatory efforts by the multitude of national level ministries and local governments to create legal bases for REDD+.[77] The result is a body of unclear and potentially inconsistent law on REDD+, susceptible to change or revocation at the whim of the institution or individual that issued it. Unfortunately, as discussed in Chapter 4, the Indonesian legal system lacks reliable mechanisms for resolving jurisdictional claims. This is probably because when Indonesia's post-Soeharto democratic

[73] 'Indigenous Indonesians Slam Forest Scheme' *Herald Sun* (22 June 2011).

[74] Brihannala Morgan, *REDD at the Community Level: Community Engagement and Carbon Conservation in Indonesia's Forests* (Master of Science Thesis, University of Michigan 2010).

[75] Simon Butt and Tim Lindsey, *The Indonesian Constitution: A Contextual Analysis* (Hart 2012) 160–62.

[76] Barr and others (n 66) ch 5.

[77] See, for example, Ministry of Forestry Regulation P.30/Menhut-II/2009 on the Methods for Reducing Emissions from Deforestation and Forest Degradation (REDD); Ministry of Forestry Regulation P.36/Menhut-II/2009 on Licensing Methods for Efforts to Exploit, Implement and/or Store Carbon in Production and Protected Forest; Ministry of Forestry Regulation P. 68/Menhut-II/2008 on the Implementation of Demonstration Activities to Reduce Carbon Emissions from Deforestation and Forest Degradation.

and constitutional system was designed after several decades of authoritarianism, its architects simply did not contemplate serious disputes emerging within the state.[78]

Political will?

One of the most frustrating issues for activists is that Indonesia's leaders appear to have embraced REDD+ but have not done enough to implement it. For example, at a September 2011 conference hosted by the Center for International Forestry Research (CIFOR), President Yudhoyono vowed to 'dedicate the last … years of [his] term as President to deliver enduring results that will sustain and enhance the environment and forests of Indonesia'.[79] In 2009, he had pledged that his government would, by 2020, reduce greenhouse gas emissions by 26 per cent of business-as-usual levels, or by 41 per cent with donor support.[80] According to one estimate, at least 14 per cent of this reduction needed to come from avoiding deforestation.[81] At the Paris climate summit—the 21st Conference of Parties (COP 21) to the United Nations Framework Convention on Climate Change (UNFCCC)—President Joko Widodo increased Indonesia's commitment to a 29 per cent reduction without international support.[82]

In 2010, President Yudhoyono signed a Letter of Intent (LoI) with Norwegian Prime Minister Stoltenberg by which Norway offered US$1 billion in incremental payments for achievement of verified emissions reductions. Acting on the LoI, Yudhoyono issued a Presidential Instruction,[83] imposing a two-year moratorium on new forestry concessions in specified 'primary natural forests and peat land in conservation forests, protected forest, production forest … and other use areas' indicated on a map included in the Instruction. Since coming to power, President Widodo has extended the moratorium twice, in 2015 and 2017.[84]

However, despite this apparent enthusiasm about REDD+ and climate change, the huge obstacles to an effective legal and institutional framework for REDD+ have not been tackled. Indeed, the Norway-supported moratorium was a litmus test of Indonesia's so-called 'REDD-readiness'—its ability to sustain ongoing and future long-term REDD+ projects, both privately and publicly funded. It was a test Indonesia soon failed, with the moratorium breached almost before it began to run. The English Environmental Investigation Agency and Telapak, its Indonesian partner, claimed that they witnessed a Malaysian plantation company, Kuala Lumpur Kepong Berhad, burning peat forest in Central Kalimantan on the day President Yudhoyono signed the Instruction to implement the moratorium.[85] Likewise, the Forestry Ministry issued concessions over land falling within the moratorium. *Greenomics Indonesia* claims that the Forestry Ministry, by Decision,[86] had already

[78] Simon Butt and Nicholas Parsons, 'Judicial Review and the Supreme Court in Indonesia: A New Space for Law?' (2014) 97 *Indonesia* 55–85.

[79] See <http://www.cifor.org/fileadmin/fileupload/media-release/27_Sep_SBY_Speech.pdf>.

[80] This pledge was formalized in the National Action Plan for Reduced Green House Gas Emissions (RAN GRK) by Presidential Regulation 61 of 2011: Wardojono, Wahjudi and Greg Fishbein, 'REDD+: A Pathway to Prosperity' *Jakarta Post* (18 July 2011).

[81] Lian Pin Koh, Serge Wich, and Meine van Noordwijk, 'Indonesian Deforestation Moratorium: The Devil is in the Details' *Jakarta Post* (21 February 2011).

[82] 'Jokowi Leaves COP21 Talks as Questions Remain over Indonesia Haze Reforms' *Mongabay* (2 December 2015) <https://news.mongabay.com/2015/12/jokowi-leaves-cop21-talks-as-questions-remain-over-indonesia-haze-reforms/>.

[83] Presidential Instruction 10 of 2011 on the Postponement of the Issuance of New Licenses.

[84] 'Indonesia President Approves Two-Year Extension of Forest Moratorium' *Reuters* (24 May 2017) <http://www.reuters.com/article/us-indonesia-environment-forests-idUSKBN18K0CV>. The most recent extension was effected through Presidential Instruction 6 of 2017.

[85] Michael Taylor, 'Indonesia Forest Moratorium Breached on First Day: Group' *Reuters* (17 June 2011).

[86] Forestry Minister Decree SK.292/Menhut-II/2011 on Changing the Status and Functions of Designated Forestland in Central Kalimantan Province.

converted the status of over 80,000 hectares of protected or conservation forest land into 'non-forest land' or 'limited production forest' to award concessions to exploit the land.[87]

The result is that Indonesia has received a very small portion of the Norway funds—mostly to prepare to implement the system, rather than as payment for deforestation avoided. In 2016, Norway's Environment Minister admitted no 'actual progress in reducing deforestation'.[88] Again, it is hard to see how a credible REDD scheme can survive in the face of government-sanctioned exploitation of 'protected' areas. Surely this failure has already deterred investors who require effective enforcement to ensure a return and maintain the reputational benefits of their investments.

Beyond the many challenges Indonesia faces in meeting the requirements of REDD+, broader concerns are now emerging about the future of the entire REDD+ initiative. Indeed, some scholars have noted that 'the mechanism's original promise to generate a global market in carbon credits is already effectively finished'.[89] Despite this pessimism, the 2015 Paris Climate Accord formally included the REDD+ mechanism as a means to reduce emissions from deforestation. Whether the scheme will be able to generate the funding required to support REDD+ projects remains highly questionable.

[87] 'Keputusan Menteri Kehutanan Disorot' *Kompas* (2 July 2011); 'RI Still Razing Forests despite Climate Deal' *Jakarta Post* (30 June 2011).

[88] 'Despite Tough Talk, Indonesia's Government Is Struggling to Stem Deforestation' *The Economist* (26 November 2016) <https://www.economist.com/news/asia/21710844-weather-helping-little-despite-tough-talk-indonesias-government-struggling-stem>.

[89] R Fletcher and others, 'Questioning REDD+ and the Future of Market-Based Conservation' (2016) 30 *Conservation Biology* 673, 674.

9

Environmental Law

INTRODUCTION

Indonesia is an archipelagic state, comprising more than 17,500 islands spread across more than 5,000 kilometres, from Sabang in the West to Merauke in the East. It has large reserves of mineral resources, including thermal coal, tin, copper, gold, nickel, and other natural resources, such as forests and marine products. However, the sustainable use, or at least moderated exploitation, of these resources has proved elusive, particularly in the past few decades. During Soeharto's New Order (1965–98), the imperative of economic development (*pembangunan*), initially fuelled by an oil boom, trumped environmental concerns. The New Order was also a time of excessive exploitation of, and considerable damage to, the environment for the private financial gain of political elites, much of it illegal. If anything, this problem has become worse since Soeharto fell in 1998. As we will show in this chapter, decentralization has, mostly, been nothing short of a disaster for environmental management and protection in Indonesia. Many local power holders have given themselves power to issue licences to raise revenue, both public and private, with little regard for environmental protection.

Indonesia's forestry sector brings many of these pressures and problems into sharp relief. Estimates vary, but Indonesia appears to have lost at least one-third of its 170 million hectares of forest coverage in the past century or so.[1] A few decades ago, this was mainly due to logging, primarily for paper and timber products. Most of this was illegal, in the sense that it was performed without a valid licence, or was performed over larger areas than covered by legitimately obtained licences. More recently, attention has turned to Indonesia's mass conversions of forested lands for plantations, resulting in significant carbon release. Deforestation accounts for two-thirds of Indonesia's greenhouse gas emissions, and makes it one of the world's largest emitters, after China, the United States, the European Union, and Brazil.[2]

Worse, the preferred method of forest and peat clearing is burning, which has resulted in thick smog causing or aggravating respiratory illnesses in Indonesia and its nearby neighbours, including Singapore and Malaysia.[3] Yet, clear financial advantages underlie these practices. Many forest areas have been cleared for plantations for palm oil, of which Indonesia is the world's largest exporter. Because land cleared by burning is more fertile, it is worth around US$856 per hectare, compared with US$665 for cut-and-slash-cleared land.[4] Local and national elites attempt to capture some of this value through a complicated system of licences, many of which are said to overlap with each other. The net result is a free-for-all, where government officials clamour to profit as quickly as they can for as long as they remain in authority and primary forests still exist.

[1] Mark Clifford, *The Greening of Asia: The Business Case for Solving Asia's Environmental Emergency* (Columbia University Press 2015) 170.

[2] See World Resources International: <http://www.wri.org/blog/2014/11/6-graphs-explain-world%E2%80%99s-top-10-emitters>.

[3] Paul J Burke and Budy P Resosudarmo, 'Survey of Recent Developments' (2012) 48 *Bulletin of Indonesian Economic Studies* 299, 311.

[4] Alice Cuddy, 'How Local Elites Earn Money from Burning Land in Indonesia' *Mongabay.com* (16 January 2017).

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While genuine efforts, both international and domestic, have been made to slow this deforestation in Indonesia, including through approaches such as the Reducing Emissions from Deforestation and Forest Degradation (REDD+) initiative, the funds available under these schemes are meagre compared with the lure of palm oil. Indonesian forestry law, and the attempted application of REDD+ in Indonesia, are discussed in Chapter 8.

Unfortunately, Indonesia's environmental problems do not begin and end with deforestation. Air and water pollution, waste management, and over-exploitation of natural resources remain significant problems. As we discuss in the next section, Indonesia's substantive environmental law, at least as it appears 'on paper', is not inherently defective and of itself does not explain the failure of environmental management. Rather, the main problem lies with the interpretation, application, and enforcement of environment-related laws. These shortcomings are the product of two phenomena.

The first is greed—of both government officials and those whose commercial activities damage the environment. In particular, many officials seek to raise revenue from licensing, including over land not designated for the purpose specified in the licence, or over land already allocated for another use. Others accept illicit payments from those who damage the environment to turn a blind eye to environmental law breaches. Of course, in the absence of effective environmental law enforcement, many commercial enterprises can act with impunity if they are willing to meet the illegitimate demands of these officials.

The second phenomenon is genuine confusion among institutions comprising the Indonesian state about how the Indonesian legal system, and its environmental laws, should work. In particular, serious disputes have emerged within the Indonesian state—primarily between national ministries and between tiers of government—about authority over various natural resources. Because they remain unresolved, these various state agencies have been able to issue overlapping, often inconsistent, regulations, creating great uncertainty about which regulations prevail over the others. Perhaps unsurprisingly, these agencies do not tend to coordinate with each other, even when their work is well-intentioned. The picture that emerges is of a multitude of actors, all claiming to be pursuing proper environmental management. At best, they are probably duplicating each other's work; at worst, they may be intentionally operating at cross-purposes.

LEGAL FRAMEWORK

Environmental law in Indonesia is inordinately complex, primarily because its sources are both various and nebulous. The primary reference point is Law 32 of 2009 on Environmental Protection and Management but this statute sits uncomfortably alongside parts of 'sectoral' legislation that also covers environmental issues. Examples of such sectoral laws include the Forestry Law,[5] the Plantation Law,[6] the Mineral and Coal Mining Law,[7] and the Marine Affairs Law.[8] These statutes are fleshed out by a jungle of legal instruments, which generally take the form of government regulations, presidential regulations or decisions, and ministerial regulations or decisions. As discussed in Chapters 2 and 3, there is significant doubt about the relative authority of many of these regulations and decisions, which makes resolving inconsistencies between them very difficult.

[5] Law 41 of 1999 on Forestry. [6] Law 39 of 2014 on Plantations.
[7] Law 4 of 2009 on Mineral and Coal Mining. [8] Law 32 of 2014 on Marine Affairs.

Adding to this complexity is the myriad of laws issued by the legislatures and executives of Indonesia's provinces, cities, and counties (*kabupaten* or 'regencies'). Again, as mentioned, there is also some uncertainty about the relative authority of these subnational laws vis-à-vis inconsistent national laws. Also relevant are the international environmental conventions and treaties that the national legislature or the president has formally ratified, such as the Law of the Sea, the Basel Convention, the Convention on Biological Diversity, and the Convention on Climate Change. However, the precise status of these treaties within the Indonesian legal system is unclear, and most Indonesian law enforcers, including judges, are reluctant to enforce them directly unless the content of those treaties has been adopted in an Indonesian law.

We now turn to discuss the primary statutory basis for environmental law in Indonesia: Law 32 of 2009 on Environmental Protection and Management (EPML).

The EPML 2009

The EPML notes that Indonesia has significant environmental resources but explicitly recognizes that the environmental problems it faces are dire, and that the government, at all levels, must effectively manage the environment as a matter of urgency. As the General Elucidation puts it:

> Indonesia is located between two continents and two oceans, with a tropical climate, weather and seasons that create natural conditions of high value. Also, Indonesia has the second largest coastline in the world and a large population. It has rich biodiversity and abundant natural resources. These resources must be protected and managed as part of a system of a coordinated and integrated system to protect and manage the sea, land and air environment … (General Elucidation, part (2))

However,

> Declining quality of the environment has threatened the continuation of life of humans and other living creatures, making it necessary for all stakeholders to protect and manage the environment genuinely and consistently (Preamble, part (d)).

The Law also explicitly acknowledges climate change and Indonesia's vulnerability to it:

> Increasing global warming has caused climate change, worsening the decline of environmental quality (Preamble, part (e)) … Indonesia is also particularly vulnerable to the effects of climate change. These effects are the decline in food production, impeded air supply, spread of pests and diseases of plants and humans, sea-level rise, submerging of small islands and the destruction of biodiversity (General Elucidation, part (2)).

The constitutional foundations for the EPML are threefold. The first is Article 28H(1) of the Indonesian Constitution, which provides that 'every person shall have the right to … enjoy a good and healthy environment'. The EPML restates this principle, declaring that all people have a right to a healthy environment as a component of their human rights (Article 65(1); Preamble, part (a)).

The second foundation is Article 33(3) of the Constitution, which provides that the state has ultimate 'control' over land, water, and the natural resources within for the maximum prosperity of the people. As we show in Chapter 18, Article 33(3) has been interpreted by the Constitutional Court as giving the state the power—and indeed, the responsibility—to play a significant hands-on role in the management of natural resources for the greatest benefit of the people. The state can hardly be said to be meeting this obligation unless it ensures that natural resources are sustainably managed.

The final foundation is Article 33(4) of the Constitution, which states that the national economy is to be based on 'environmental perspectives' and 'sustainability principles'.

Environmental impact assessments and environmental permits

The EPML covers both environmental impact assessments (EIAs)[9] and environmental permits.[10] The EIA system has existed since 1987.[11] All businesses or activities likely to have a significant impact on the environment must conduct an EIA.[12] Factors contributing to the 'significance' or otherwise of environmental impact are: the number of people affected by the activities; the size of the region affected; the intensity and duration of the impact; the environmental components likely to be affected; the cumulative characteristics of the impact; the reversibility or irreversibility of the impact; and/or other criteria 'in accordance with developments in science and technology' (Article 22(2) of the EPML). The Law specifies other types of business or activities that require production of an EIA, including, among others, those that: change the shape of land or landscapes; could cause pollution, environmental degradation, and natural resource depletion; are high-risk and affect state security; or exploit either renewable or non-renewable natural resources (Article 23(1)).[13] EIAs must disclose the expected impact of the activities around the site of the proposed business, explain the suitability of the site for those activities, and provide an environmental management and monitoring plan.

In preparing the EIA, the entity must consult with communities and others likely to be affected by the proposal or the EIA process, and 'environmental observers', who include experts and academics (Article 26(3)).[14] This consultation can take the form of workshops, seminars, focus group discussions, or community meetings, and the entity must include in the EIA any community feedback it obtains about the business during these consultations (Article 25(c)). In these dealings, the entity must 'adhere to the principles of transparent and comprehensive information sharing' (Article 26(1), (2)) but, in practice, community members commonly report difficulties in obtaining access to relevant information from these entities.[15]

[9] The section focuses on EIAs and environmental permits. We note, however, that various Indonesian laws regulate other types of environment-related licences that are required to run particular types of businesses or activities. These include: disposal of waste water (Government Regulation 82 of 2001 on the Management of Water Quality and Control of Water Pollution); storing, collecting, using, treating, and/or land filling hazardous and toxic waste (Government Regulation 101 of 2014 on the Management of Hazardous Waste); and various forestry activities (Law 41 of 1999 on Forestry). Water exploitation was, at the time of writing, covered by Government Regulation 121 of 2015.

[10] At the time of writing, the provisions of the EPML about environmental permits and EIAs were implemented by several regulations. These include: Government Regulation 27 of 2012 on Environmental Permits (which also covers EIAs given that, since the EPML's enactment, environmental permits and EIAs are treated as a single document, with the EIA attached to the environmental permit); Environment Minister Regulation 5 of 2012 on the Type of Business and Activities that Must Conduct EIAs; Environment Minister Regulation 16 of 2012 on Guidelines for Drafting Environmental Documents; Environment Minister Regulation 17 of 2012 on Guidelines for Public Participation in EIAs and Environmental Permits; and Environment Minister Regulation 8 of 2013 on Procedures for Assessment and Examination of Environmental Documents and Environmental Permits.

[11] Government Regulation 29 of 1986. However, this regulation only came into effect in June 1987 (see Art 40). The reason given for this was that the government needed time to establish criteria for social and environmental impact.

[12] EIAs can only be prepared by individuals or entities that possess an official certificate of competence in conducting EIAs (Art 28(1), EPML). Also relevant are mining exploration and operation licences (see Law 4 of 2009), which we discuss in Chapter 18.

[13] Minister of Environment Decision 5 of 2012 on the Type of Business and Activities that Must Conduct EIAs contains a more detailed list, categorized by sector, such as security, agriculture, fisheries and maritime, forestry, and industry.

[14] Businesses must announce their business plans prior to the preparation of an EIA for ten working days (Ministerial Regulation 17 of 2012 on Community Involvement in the Environmental Impact Assessments and Environmental Permit Process, Section B). Community members can then provide input for up to ten days following the announcement period.

[15] Dewi Astuti and Herdiansyah Hamzah, 'Penguatan Partisipasi Masyarakat dalam Penyusunan Izin Lingkungan' (2014) 3(9) *Jurnal Beraja Niti* 1 <http://download.portalgaruda.org/article.php?article=414143&val=2306&title=PENGUATAN%20PARTISIPASI%20MASYARAKAT%20DALAM%20PENYUSUNAN%20IZIN%20LINGKUNGAN%20(STUDI%20CV.%20ARJUNA)>.

EIAs are then assessed by a national, provincial, city, or county commission, again depending on which entity has authority over the proposed activity (Article 29). These commissions consist of government officials who deal with environmental or related technical matters, scientists, community representatives, and environmentalists (Article 30(1)) but finding members with the requisite expertise and objectivity is often difficult.[16] The main criteria against which the committee is to assess the environmental feasibility of the proposal are the scale and significance of the geophysical, social, economic, cultural, spatial, and community health effects of the activity. The committee is then to balance the 'negative' and 'positive' aspects of the proposed activity and assess whether the business can manage the adverse effects (Article 29(4) of Government Regulation 27 of 2012). The relevant authority is then to use the commission's findings to determine whether the proposal is environmentally feasible (Article 31 of the EPML).

This EIA process is fraught with shortcomings that can make the system ineffective. One common complaint is inconsistency of standards established by different provinces and counties. Another is that EIAs are not properly assessed, if at all, with 'special dispensation' often being accorded to powerful and well-connected applicants, probably in return for an illicit payment.[17] Yet another is that the process lacks transparency, with government officials often keeping EIA drafts and terms of reference from the public, even though formally they are public documents, to avoid scrutiny.[18] Finally, many EIAs are thought to be simply copied from previous submissions for other projects, yet are approved without question.

Other types of businesses whose activities could be expected to have less of an environmental impact still require an Environmental Management and Monitoring Plan (EMMP). Indeed, the relevant national or subnational government can require a business that wishes to perform an activity that does not meet the threshold to require an EIA to instead prepare an EMMP (Articles 34–35 of the EPML).[19]

All businesses and activities that require either an EIA or EMMP must obtain an environmental permit as a prerequisite to obtaining an operating permit. The licence approval process involves assessment of the environmental feasibility of the proposed activity, primarily based on the submitted EIA or EMMP (Article 36 of the EPML), any community input or objections, and commission findings.[20] A decision on environmental feasibility must contain the reasoning for the decision, a statement of feasibility, and any conditions on the permit relating to managing environmental risks.

Environmental permits are issued by the Environment Minister, a governor, mayor, or 'regent' (*bupati*, head of a county), depending on the level of government responsible for issuing the permit (Article 36(4)). In principle, if the national government is responsible for the permit, then the minister issues the permit; if a provincial government is responsible, then that province's governor issues it; and if a city or county has responsibility, then the

[16] John McCarthy and Zahari Zen, 'Regulating the Oil Palm Boom: Assessing the Effectiveness of Environmental Governance Approaches to Agro-Industrial Pollution in Indonesia' (2010) 32 *Law & Policy* 153, 158.

[17] Margaret A Young, 'The Primacy of Development: Environmental Impact Assessment in Indonesia and Australia' (1999) 1 *Australian Journal of Asian Law* 154, 160.

[18] *Strengthening the Right to Information for People and Environment* (Indonesian Center for Environmental Law 2013).

[19] Environment Minister Regulation 5 of 2012 on Types of Businesses and Activities that Must Conduct EIAs lists the businesses and activities that require an EIA and additional criteria for businesses and activities that require EMMPs. Such activities must not be carried out in protected areas or adjacent to protected areas. This Regulation provides lists of twenty areas which are protected, such as peatlands, protected forests, water catchment areas, and national parks.

[20] Community members who object to an environmental permit being issued may dispute the permit in the state administrative courts, which have the power to overturn a decision to issue an environmental permit (Art 38, EPML). Members of the public may also lodge objections to an EIA (Art 26(4), EPML). For discussion of the administrative courts, see Chapter 4.

relevant mayor or regent issues it. However, as we shall see in the *North Jakarta Coastal Reclamation* case discussed below, identifying the authority from whom an environmental permit is required can be complicated and cause great controversy.

Of course, environmental permit holders must comply with the requirements, and any conditions, of their environmental permits. They must also produce and submit regular six-monthly performance reports detailing how these requirements and conditions are met.[21] Failure to comply or report can result in administrative sanctions, including suspension or revocation of the permit (Articles 71 and 72 of Government Regulation 27 of 2012). The issuing authority can cancel an environment permit if it contains a legal error, mistake, or false information; or if the business fails to meet the conditions of the licence (Article 37(2) of the EPML). Because an environmental licence is a prerequisite for a general business licence, the cancellation of an environmental permit is a ground for the revocation of the business licence (Article 40(2) of the EPML). Businesses or individuals that must obtain an environmental permit but do not, and continue with their activities regardless, face between one to three years' imprisonment and a fine of between Rp 1 and 3 billion (Article 109 of the EPML).

EIA process case study: The North Jakarta Coast Reclamation case

From the mid-1990s, the Jakarta city government has sought to 'reclaim'[22] land off the north coast of Jakarta.[23] Around that time, Jakarta Governor Sutiyoso contracted six private companies to carry out a major reclamation project, to add 2,700 hectares of land to Jakarta's north coast.[24] The companies, some of which appeared to have connections with the Soeharto regime, prepared an EIA, which Sutiyoso subsequently approved.[25] However, this approval was controversial, with environmental groups voicing concerns about the serious environmental risks associated with the project, and local fishermen complaining about the project affecting their livelihoods.

In February 2003, the Environment Minister, Nabiel Makarim, who was also Chairperson of the Central Government EIA Commission, conducted a separate evaluation, which found that the governor's decision to approve the EIA was unsound. According to the Minister, the EIA had failed to consider the project's potential to worsen the impact of flooding in North Jakarta, rising sea waters, and king tides. The Minister also noted that environmental consequences of the proposed project would flow beyond Jakarta's provincial boundaries into the surrounding districts of Tangerang and Bekasi, which took the matter beyond the governor's jurisdiction.[26] The minister issued a formal decision prohibiting the reclamation project.[27]

[21] See Art 53, Government Regulation 27 of 2012.

[22] Several reclamation cases have been heard by Indonesia's courts. For a brief description of some of them, see 'Putusan-Putusan Pengadilan Terkait Reklamasi' *Hukumonline* (19 April 2016).

[23] See Presidental Decision 52 of 1995 on the Reclamation of the Jakarta North Coast and Jakarta Local Government Regulation 8 of 1995.

[24] Adriaan Bedner, 'Consequences of Decentralization: Environmental Impact Assessment and Water Pollution Control in Indonesia' (2010) 32(1) *Law & Policy* 38, 46. These companies included PT. Bakti Bangun Era Mulia, PT. Taman Harapan Indah, PT. Manggala Krida Yudha, PT Pelabuhan Indonesia II, PT. Pembangunan Jaya Ancol, and PT. Propertindo.

[25] 'Jalan Panjang Reklamasi di Teluk Jakarta, Dari Era Soeharto Sampai Ahok' *Kompas* (4 April 2014).

[26] Art 11(1), Government Regulation 27 of 1999 on EIA, which formed the legal basis for EIAs at the time of the project, stipulated that the authority to assess the EIA of a project located in more than one province lies with the National EIA Commission. We note that this regulation has now been replaced by Government Regulation 27 of 2012.

[27] Minister of Environment Decision 14 of 2003 on the Unsuitability of the Proposed Pantura Reclamation and Revitalisation Activity.

The six companies sued the Ministry of Environment in the Jakarta district administrative court,[28] seeking invalidation of the decision on two main grounds. First, they argued that the minister lacked jurisdiction to issue the decision, claiming that this fell within the exclusive authority of the governor. Second, they claimed that the Minister's Decision was not based on an accurate assessment of all relevant facts. If it had been, the claimants argued, the Minister would have concluded that the reclamation would have had a net 'positive' environmental impact.

The Jakarta administrative court, at both first instance and on appeal, found in favour of the six companies and ordered the minister to revoke the decision. However, the minister won a further appeal before the Supreme Court, which held the Decision was merely a decision-making process and not a 'final decision'.[29] The administrative courts, therefore, lacked jurisdiction to review it.

The companies then approached the Supreme Court again, asking it to reopen the case using *peninjauan kembali* or reconsideration processes outlined in Chapter 4. The Supreme Court accepted the case and overturned its previous decision, finding that the Ministerial Decision was in fact a 'final decision' capable of review by the administrative courts.[30] This was clear from the words of the Ministerial Decision itself, which ordered relevant agencies to refuse to grant permission for the business activity. Accordingly, the Court held that the Decision was invalid. The Court stated that even if there were procedural flaws in the EIA process, the reclamation project was supported by a 1995 presidential decision and thus could not be stymied by a ministerial decision. Thus, according to the Court, if the project was to be cancelled on EIA grounds, this should be done by presidential decision, not a ministerial decision.

This is an odd conclusion, as it seems to have involved the Court reasoning that a presidential decision could trump the EIA requirements and procedures set out in national legislation. As explained in Chapter 2, Indonesia's hierarchy of laws indicates that national statues prevail over any such lower-level regulations. The Supreme Court's decision has also been criticized for contradicting others in which the Court has found the same types of ministerial decisions to be not final and binding. According to Bedner, the first instance and appeal judgments were 'legally incomprehensible',[31] and the case as a whole illustrates the dangers in regional control of the EIA regime, with regional commissions likely to face intense political pressure to approve projects and lower compliance requirements.[32]

Environmental standards

Indonesia's overall approach to environmental regulation is often described as 'command and control', instead of the more incentive-based regimes used in other countries. The EPML itself establishes quality standards that enable agencies to identify where pollution or environmental degradation has occurred (Articles 20(1) and 21(1) of the EPML). These quality standards regarding pollution apply to water, waste, seawater, ambient air, emissions, interference levels, and the like. However, details of specific standards are set out in various regulatory instruments, including national executive laws or decisions, and provincial and city or county-level regulations. As mentioned in Chapter 3, there are more than 500 city or county governments across Indonesia. This makes for a bewildering number of environment-related standard-setting regulations across the archipelago. For example, air pollution control in Jakarta is governed by national government regulations on air pollution control;[33] regional

[28] Decision 75/G.TUN/2003/PTUN-JKT.
[29] Decision 109/K/TUN/2006. [30] Decision 12/PK/TUN/2011.
[31] Bedner (n 24) 46. [32] ibid 47.
[33] Government Regulation 41 of 1999 on Air Pollution Control.

air pollution control regulations;[34] regulations on air quality standards set by the governor;[35] and various specific regulations establishing relevant regional monitoring bodies.[36]

Monitoring and auditing for compliance

For most businesses, internal environmental audits and monitoring are voluntary, although the government should encourage businesses to conduct them (Article 48 of the EPML). However, companies whose activities carry a 'high environmental risk', or that have not complied with environmental laws in the past, may have to conduct audits (Article 49). 'High risk' activities are those that would cause extensive and significant impact on human and environmental health if an accident or emergency were to take place. Companies whose activities are classified as 'high risk' include petrochemical industries, oil or gas refineries, and nuclear plants (elucidation to Article 49). If a party required to conduct an audit fails to do so, the relevant minister may, at the expense of that party, commission a third party to conduct the audit (Article 50).

Environmental monitoring falls under the responsibility of all three levels of government, each of which can delegate its authority to specific officials or technical agencies (Article 71(1) and (2) of the EPML). Each level of government must oversee compliance with the environmental permits that they issue (Article 72). The Environment Minister may take over monitoring of a business or activity from a regional government if a serious environmental breach has occurred—that is, a breach causing pollution or environmental damage that is relatively large and causes public unrest (Article 73 and its elucidation).

ENVIRONMENTAL MANAGEMENT: AUTHORITY, CONFLICT, AND FRAGMENTATION

As mentioned, environmental governance has been largely ineffective in Indonesia, for various reasons. Here we focus on two issues that make effective environmental management particularly difficult. The first is that responsibility for it has traditionally been allocated to government departments or agencies that have either lacked power to do it properly, had power but were not particularly interested in wielding it, or had interests inconsistent with environmental protection. The second reason is the wide dispersal of regulatory authority over environment-related issues. The resulting fragmentation plays out both horizontally (primarily across national government institutions) and vertically (as between the national and subnational tiers of government).

Horizontal conflict

From 1983 to 2014, Indonesia had a government ministry dedicated to environmental management—the Ministry for the Environment. The authority of this ministry was limited, and it was often considered weak, at least compared to more powerful ministries, such as the Ministry of Energy and Mineral Resources and the Ministry of Forestry, which

[34] Jakarta Provincial Government Regulation 2 of 2005 on Air Pollution Control.

[35] For example, Jakarta Governor Decision 551 of 2001 on Ambient Air and Noise Standards.

[36] To measure environmental degradation, standards have been imposed in relation to: coral reefs (Minister of Environment Decision 4 of 2001 on Standard Criteria for Coral Reef Damage); mangroves (Minister of Environment Decision 201 of 2004 on Standard Criteria for Mangrove Damage); sea grass (Minister of Environment 12 of 2008 on Waste Water Standards for Seagrass Processing Business and/or Activities); karst-systems (Minister for Energy and Mineral Decision 17 of 2012 on Karst Landscape Zones); peat (Government Regulation 71 of 2014 on the Protection and Management of Peat Ecosystems); forest or land fires (Government Regulation 4 of 2001 on Environmental Degradation and Pollution Control from Forest and Land Fires); and other ecosystems.

we discuss below.[37] Of great significance was that the Minister for the Environment did not formally have a portfolio, which meant, inter alia, that his or her Ministry did not have direct formal oversight over provincial and regional environment management agencies, which had separate organizational structures.[38] In other words, it had very limited formal authority to require subnational governments to follow the national environmental policies it stipulated.

At a policy level, the Ministry was responsible for issues including: national climate change; toxic and hazardous waste management; marine protection; cross-border environmental pollution and degradation; coordinating inter-provincial cooperation and dispute resolution; and setting minimum service standards and procedures for recognizing indigenous communities and their environment-related rights.[39] However, the Ministry for the Environment's authority to give legal effect to many of its policies was, again, relatively weak, and its enforcement powers were limited. Its decisions were often ignored and, while it had power to investigate environmental crimes, it relied on other entities to pursue infringements, at least if they were to be brought before a criminal court.[40]

Various national sectoral ministries are also involved in environmental management because the matters over which they exercise authority affect the environment. These include the Ministries of Marine Affairs and Fisheries, Energy and Mineral Resources, Agriculture, Forestry, Trade, and Finance. These ministries or departments are notorious for failing to adequately coordinate with each other, leading to inconsistent policies and bureaucratic inertia, as disagreements emerge about which ministry has responsibility or power to do what. This can be contrasted with the more lucrative activities of natural resource exploitation, where ministries have fought for, or simply asserted, authority over issuing licences and monitoring, as we discuss below.

The system that has emerged is highly 'sectoral' or 'siloed', particularly at the national level. So, for example, the Ministry of Forestry has traditionally paid little regard to legislation other than the Forestry Law, including the EPML, even though the EPML applies generally and, therefore, formally binds it. One implication of this is that the Forestry Ministry has long issued decisions that fail to consider the EPML or decisions of the Environment Ministry, and may in fact be inconsistent with them. Worse, the courts are also said to perpetuate this sectoral approach, albeit inconsistently. For example, sometimes they refuse to apply the EPML to what they see as 'sector-based' cases, when, in fact, the EPML could be applied and provides heavier penalties for breach.[41]

To overcome this, some advocates proposed the establishment of a special environmental court. While this has not happened, the Supreme Court, in 2011, introduced a certification system for judges. Under this system as initially conceived, only judges with special environmental science and environmental law training would hear environment-related cases. However, budget and human resource shortages have led to a watering down of this scheme so that senior uncertified judges can now handle environmental cases.[42]

Of these sectoral ministries involved in environmental management, perhaps the most important has been the Forestry Ministry, at least in recent decades. As mentioned, one

[37] Originally a division within the Agriculture Ministry, it was established as a separate department in 1983: Presidential Regulation 15 of 1984.

[38] Takdir Rahmadi, *Hukum Lingkungan di Indonesia* (RajaGrafindo Persada 2011) 70–85.

[39] See Art 63, EPML.

[40] Under the 2009 EPML, civil servant investigators were empowered to directly submit case files (*berkas perkara*) to prosecutors, without needing to involve the police. However, these civil investigations have been hampered by lack of human and financial resources. In any event, police are said to regularly intervene in, or interfere with, these investigations.

[41] Simon Butt, Rosemary Lyster, and Tim Stephens, *Climate Change and Forest Governance: Lessons from Indonesia* (Routledge 2015).

[42] Simon Butt and Prayekti Murharjanti, 'Indonesia' in Emma Lees and Jorge Vinuales (eds), *Oxford Handbook of Comparative Environmental Law* (Oxford University Press 2018).

of Indonesia's most serious environmental problems is deforestation (and the greenhouse gases thereby released), through forest burning and illegal logging. These issues fell squarely within the jurisdiction of the Forestry Ministry—the national institution primarily responsible for managing Indonesia's forest areas. This control made the Ministry very powerful and able to assert itself over other sectoral ministries, including the Environment Ministry itself, although this often resulted in conflict.[43]

Unfortunately, however, the forestry sector and the Ministry itself developed a well-deserved reputation for high levels of corruption. In 2011, Indonesia's leading anti-corruption watchdog NGO, Indonesia Corruption Watch (ICW), released findings indicating that forestry sector corruption in Central and West Kalimantan alone had resulted in state losses over US$1 billion.[44] ICW also found at least seven companies in West Kalimantan had illegally converted forested areas into palm oil plantations, and at least fifteen companies in Central Kalimantan illegally managed 211,580 hectares of forest between them.[45] A 2011 Reuter's report claims that the Forestry Ministry earned US$15 billion a year in land permit fees, and ICW estimated that US$2.3 billion of that came from illegal logging and kickbacks from improperly issued licences.[46] In 2013, Indonesia's Corruption Eradication Commission (*Komisi Pemberantasan Korupsi*, KPK) released a study on corruption of licensing in the forestry sector, finding that around Rp 22 billion in bribes was paid each year. A KPK study published in October 2015 revealed that, between 2003 and 2014, the state lost Rp 86.9 trillion in potential non-tax revenue from the forestry sector, again because of corruption.[47]

The Forestry Ministry's mismanagement of the so-called reforestation fund (*dana reboisasi*), established during Soeharto's reign to finance the rehabilitation of degraded land and forests, is a case in point. Over twenty years, almost $US 6 billion was paid into this fund by timber concession-holders,[48] yet, according to one account, large sums were used to support politically favoured projects with no connection to deforestation or were directly embezzled by political elites.[49]

In 2014, President Joko Widodo—the owner of a furniture business reliant on Indonesian timber—made the most significant change to national environmental governance in decades, merging the Ministry of Environment and Ministry of Forestry into the Ministry of Environment and Forestry.[50] Some see this as implicit recognition that Indonesia's biggest environmental problems come from the forestry sector, and argue that the merger will support sustainable forestry, better conserve protected forests, and allow stronger action against the underlying causes of forest fires.[51] However, critics suggest that the ministries have had different, perhaps incompatible, purposes, with the Forestry Ministry tending to focus on the exploitation of forests, while the Environment Ministry's concern was preserving the environment.[52] It was feared that, in these circumstances, the powerful interests of former Forestry Ministry officials would overwhelm those of the former Environment Ministry

[43] Chris Lang, 'REDD Faces All Round. Norway's Investment in Forest Destruction' (17 June 2011) <http://www.redd-monitor.org/2011/06/17/redd-faces-all-round-norways-investment-in-forest-destruction/>.

[44] 'Illegal Forestry in Kalimantan Can Cost the State 1bn' *Jakarta Post* (27 September 2011).

[45] ibid.

[46] D Fogarty, 'Special Report: How Indonesia Hurt Its Climate Change Project' *Reuters* (16 August 2011).

[47] 'Watchdog Reported Alleged Corruption in Forestry Sector' *Jakarta Post* (7 January 2017).

[48] Christopher M Barr, *Decentralization of Forest Administration in Indonesia: Implications for Forest Sustainability, Economic Development, and Community Livelihoods* (Center for International Forestry Research 2006) 95.

[49] ibid 60.

[50] Presidential Regulation 16 of 2015 regarding the Ministry of Environment and Forestry.

[51] Daniel Murdiyarso, 'Merging Environment and Forestry Ministries: Quo Vadis?' *Jakarta Post* (7 November 2014).

[52] Hans Nicholas Jong, 'Jokowi's Merging of Environment, Forestry Ministries Scorned' *Jakarta Post* (24 October 2014).

within the new structure, dampening even the limited oversight the Environment Ministry had wielded. Other critics questioned why the Environment Ministry was not instead merged into other 'sectoral' ministries, such as Energy and Mining, or Agriculture, given the potentially adverse environmental impacts of those activities.[53]

At time of writing, it is too early to assess the effect the merger has had on forest governance and overall environmental protection in Indonesia.

Vertical conflict

Indonesia's environmental management and protection system is also vertically fragmented. Since 2001, when regional autonomy commenced, environment-related powers and responsibilities have been dispersed among national, provincial, city, and county governments, but these powers and responsibilities have not been clearly demarcated, as we show in Chapter 3. A classic example of such a conflict occurs where both local and national governments grant themselves power to issue the same kinds of licences to allow businesses to exploit natural resources, but set different conditions and charge their own fees. Another example is where a local government grants itself licensing power in breach of a national statute, or vice versa.

As discussed in Chapter 4, a significant weakness of Indonesia's legal system is its lack of reliable or comprehensive institutional mechanisms for resolving conflicting laws and jurisdictional disputes, which can lead to protracted conflict between tiers of government. A good example of some of the problems this creates, and the environmental problems that ensue, is the jurisdictional disputes that have emerged between the national government and local governments in forest-rich regional areas. We discussed this example briefly in Chapter 2 on lawmaking.

In the early days of decentralization, some local governments used their new lawmaking powers to allow themselves to authorize logging and other forest activities.[54] According to Barr et al:

> The enthusiastic efforts of *kabupaten* [county] governments to establish direct administrative control over the forests within their jurisdictions generated a plethora of district regulations, or *perda*, which often stood in stark opposition to the national government's forestry laws. In some cases, the new district regulations provided varying degrees of legitimacy to timber that was harvested without permits from government agencies at any level. Operationally, many districts also showed that they had little capacity for regulating the activities of the timber companies that received district logging and conversion permits. This led critics, particularly in [the Forestry Ministry], to charge that district governments had effectively used the decentralization process to 'legalize' illegal logging. In many cases, as well, district governments allocated logging licenses and forest conversion permits in sites that directly overlapped with areas previously assigned to HPH-holders … many of the *perda* issued by district governments to regulate timber production within their jurisdictions directly contradict regulations issued by the … [Ministry of Forestry], thereby appearing to authorise practices that the central government considers to be illegal. The fact that there has not been a clear mechanism for resolving such legal-regulatory contradictions in a timely manner has been a major impediment to Indonesia's decentralization process.[55]

To be fair, some of the 'early' Perda in which regional governments sought to grant themselves power to issue licences may well have been 'legal' when they were enacted, which means that some licences issued under those Perda probably remain legally valid today.[56] To explain this, we must discuss Government Regulation 6 of 1999 on Commercial

[53] ibid. [54] This section draws on Butt, Lyster, and Stephens (n 41). [55] Barr (n 48) 88, 99.
[56] See Chapters 2 and 3, on lawmaking and decentralization, respectively.

Forestry Enterprises and Harvesting of Forest Products from Production Forests (the 1999 Government Regulation), issued soon after the fall of Soeharto as part of what appeared to be a genuine desire from the central government to satisfy regional demands for greater control over natural resources and the proceeds of their exploitation. The Regulation covered forestry exploitation concessions (*hak pengusahaan hutan*) and forestry product harvesting concessions (*hak pemungutan hasil*) (Article 4). Forestry exploitation concessions permitted rights holders to fell trees, regenerate forests, and manage and market forest products in natural forests (Article 5(2)). Forestry exploitation concessions permitted planting, harvesting, management, and marketing activities in plantation forests (Article 5(3)).

Critically, both governors and national ministries were granted authority to issue forestry exploitation concessions, although governors were limited to issuing rights over forest areas less than 10,000 hectares (Article 11(2)).[57] For areas less than 50,000 hectares, concessions could be granted through a simple application process (Article 7(2)). For larger areas, however, an 'auction' mechanism was required, under which the government would first designate the forest area for exploitation and then 'sell' that right to the highest bidder (Article 7(1)).[58] The national government was required to 'consider' the views of the governor of the province when issuing these larger concessions (Article 11(1)).

By contrast, the Regulation authorized county heads (or regents) to issue forest 'harvesting' concessions (Articles 1(17), 22(1), and 22(3)), apparently without the need for competitive processes.[59] The concession could be awarded over a 100-ha area for 1 year (Article 24(1)). It could also, however, simply cover 'a certain amount' (Article 24(1)(b)). Presumably this allowed exploitation until a particular volume of forest products was reached, regardless of how long this took, but the Regulation prescribed no limit. It is possible, then, that many of these licences remain valid, provided that the specified 'yield' has not yet been met.

Under the 1999 Regulation, county governments issued thousands of timber extraction permits and forest conversion licences. To that end, Perda were often issued to provide a regional legal basis for these concessions, and were also often the legal form used to grant the concession.[60] Even though these permits were intended to allow for small-scale logging operations, many local governments were said to 'abuse' these new powers, issuing thousands of concessions for large-scale logging over areas far exceeding these hectare limits. Some local officials were said to have granted multiple permits simultaneously, thereby opening large areas for logging, sometimes overlapping with concessions issued by the Forestry Ministry.[61] Foreign entities, formally unable to obtain most types of these concessions, reportedly obtained access by partnering with local concession-holders.[62]

[57] Both national and regional governments were prohibited from issuing rights to a single entity over 100,000 hectares per province, or over 400,000 hectares throughout Indonesia (Art 8(1)(a)–(b)). In Irian Jaya (now Papua and West Papua provinces), however, entities could hold up to 200,000 hectares (Art 8(1)(c)).

[58] For natural forests, concessions could last up to twenty years; for plantation forests up to thirty-five years (Art 15(1) and (2)). Foreign legal entities could obtain rights over plantation land, but not natural forest (Art 10(2)(d)).

[59] Although it appears that wholly or partly foreign-owned companies were not permitted to obtain extraction concessions (Art 22(2)), and the permits were supposed to be prioritized for meeting the needs of local people (Art 24(2)).

[60] See, for example, North Luwu District *Perda* 5 of 2001 on Licensing of Forestry and Plantation Enterprises in Luwu Utara, which created nineteen types of forestry and plantation permits: Barr (n 48) 47.

[61] Giorgio Budi Indrarto and others, 'The Context of REDD+ in Indonesia' (Center for International Forestry Research (CIFOR) 2012) 27–28. Statistics on the proliferation of small-scale licences during this time and the different labels attributed to the licences are provided in Barr (n 48) 89.

[62] Also, local governments were issuing concessions of a similar size to those of the national government, but without being subject to the Indonesian Selective Cutting and Planting (TPTI) system, which imposed various conditions, including requiring sustainable logging: Indrarto (n 61) 27.

With logging spiralling out of control, the central government sought to wind back the concession-granting powers of local governments. In 2000, the Forestry Ministry sought, by decision,[63] to defer the implementation of a decision it had issued in 1999[64] to 'implement' the 1999 Government Regulation. This was closely followed by another Forestry Ministry Decision in 2000,[65] which expressly prohibited governors, regents, and mayors from issuing these permits. However, the Decision also provided that existing concessions would remain in force (Article 4(a)).

The Forestry Ministry's regulatory efforts were largely ignored, with regional governments continuing to issue their own regulations and policies to maintain power to grant logging and forest conversion licences.[66] For example, the Berau district government, in East Kalimantan, created its own new type of licence: to Extract Timber from Private Land (*Izin Pemungutan Kayu Tanah Milik*, IPKTM). This allowed logging and extraction outside the formally demarcated boundaries of forest areas. The Berau government also encouraged the registration of traditional land as private land so that these licences could be awarded over it.[67]

The central government responded by issuing Government Regulation 34 of 2002 on Forestry Administration and the Formulation of Plans for Forest Management, Forest Utilisation and Use of Forest Estates (the 2002 Regulation), which replaced the 1999 Regulation (Article 100).[68] This gives: regents and mayors the power to issue harvesting permits for timber and non-timber products, and exploitation concessions for non-timber products over forests in their counties or cities; governors to issue such permits over forests that cross counties or cities; and the minister to issue them over forests that cross provinces (Articles 38 and 40).[69]

However, the regulation returns exclusive power to the minister to issue timber exploitation concessions over natural and plantation forests in provinces, cities, and counties, although this should be 'based on the recommendation' of the regent or mayor and governor (Article 42). The effect of the 2002 Regulation was, therefore, to 'effectively [recentralize] regulatory control over the harvesting, processing, and marketing of forest products, [in] particular timber'.[70] This particular concession is awarded by way of auction (Article 43(3)–(4)), similar to the process described above in the 1999 Regulation. These concessions allow their holders to log, transport, process, and trade natural forests timber products (Article 29(1)) and to log and harvest plantation forests (Article 30(1)). The duration and geographic scope of the concession depends on the type of concession (Article 35). For example, Article 35(3) states that a commercial use permit to exploit timber products in natural forests can be granted for a maximum of fifty-five years, whereas in a plantation forest, a commercial use permit to exploit timber products can be granted for a maximum of 100 years (Article 35(5)). Many county governments appear to have followed the government regulation and no longer issue such licences.[71] However, until this occurred, deforestation undoubtedly took place at very high rates.

[63] Forestry and Estate Crops Ministry Decision 310/KPTS-II/1999 on Guidelines for Issuing Forestry Product Harvesting Permits. This Decision confirmed that district-level governments have power to issue these permits and outlines the application process for obtaining them (Art 4(1) and (2)).

[64] Forestry Ministry Decision 084/Kpt-II/2000 on Deferment of the Implementation of Ministry of Forestry and Estate Crop Ministry Decision 310/Hpts-II/1999.

[65] Forestry Ministry Decision 05.1/Kpts-II/2000 on Criteria and Standards for Forest Product Use Permits and Forest Product Extraction/Harvesting Permits in Natural Production Forests.

[66] Barr (n 48) 91. [67] ibid 91–92.

[68] Similarly, Forestry Ministry Decision 6886/Kpts-II/2002 on Guidelines and Methods of Granting Forest Product Extraction Concessions (IPHH) appears to implement Government Regulation 34 of 2002, abolishing the Forestry and Estate Crops Ministers Decision 310/KPTS-II/1999, which was an implementing regulation of the 1999 Regulation.

[69] The Regulation sets out different types of permits and concessions that can be issued to various entities, such as individuals, cooperatives, or commercial enterprises. For a useful summary, see Barr (n 48) 50–51.

[70] Barr (n 48) 32. [71] ibid 104.

Another widespread practice is for authority to be delegated 'down the chain' to lower levels of government to issue detailed regulations on a particular matter, which leads to inconsistent laws on similar issues across Indonesia. For example, the management and control of fire-related environmental degradation is governed by: national regulations (for fires that cross provinces or national borders); provincial government regulations (for cross-city or county fires); and city or county regulations (for fires contained within a city or county). To add complexity, sectoral regulations, such as from the Ministries of Agriculture or Energy and Mineral Resources, might also apply to the extent that businesses or activities that are subject to fire prevention or mitigation obligations fall under that agency's supervision. In addition, both national technical standards and region-specific indicators apply for measuring fire-related environmental degradation. Unsurprisingly, this regulatory complexity results in overlapping authority and confusion.

ADMINISTRATIVE AND CRIMINAL ENFORCEMENT

The EPML prohibits causing pollution or environmental degradation, dumping toxic or hazardous waste, and releasing genetically engineered materials (Article 69(1)). The Law also requires mitigation of degradation or pollution and environmental rehabilitation if damage occurs (Article 54(1)). It specifies that businesses must guarantee funds for these purposes, if the relevant authority so requests (Article 55). The minister, relevant governor, mayor, or regent can impose administrative sanctions for non-compliance, including reprimands, suspension of activities, and licence cancellation (Article 76).[72] However, the more serious sanctions appear to be rarely used in practice, and activists claim that administrative enforcement, in general, is not pursued enough. There are numerous explanations for this, including a lack of human and financial resources for monitoring and enforcement, and serious violence and threats being made against administrative officials conducting these activities.[73] As a result, the government is regularly criticized for failing to prevent continuation of environmental harm.[74]

Individuals and NGOs can sue the government for failing to enforce administrative sanctions. A recent, and controversial, example was the *Kendeng* case.[75] Several farmers and Walhi (*Wahana Lingkungan Hidup Indonesia*, Indonesian Forum for the Environment), a prominent NGO, sought the cancellation of an environmental permit for a cement factory (PT Semen Indonesia), which was issued by the governor of Central Java.[76] This licence allowed the factory to exploit a karst mountain, which had served as a reservoir for hundreds of years, providing water resources for surrounding agriculture and fourteen local areas. Although unsuccessful at first instance, on appeal, and on cassation, the plaintiffs won a *peninjauan kembali* (reconsideration) application before the Supreme Court. In its decision, the Supreme Court cancelled the licence and ordered the governor to revoke it. However, the Central Java governor was defiant, issuing a new environmental permit on 23 February 2017, with only slight location changes.[77]

[72] If the minister believes that a regional government has failed to impose a sanction when it should have done so, the minister can directly impose one (Art 77, EPML).

[73] AECEN, *Rapid Assessment on Environmental Compliance and Enforcement in Indonesia* (Asian Environmental Compliance and Enforcement Network 2008); Indra Nugraha, 'Bagaimana Penegakan Hukum Lingkungan Pada 2016? Berikut Penjelasan Dari Kementerian' *Mongabay* (22 December 2016).

[74] Laure Yvonne d'Hont, 'Indonesia's Environmental Law of 2009 and Its Administrative Coercion Provisions: A Conceptual Misunderstanding with Large Practical Implications?' *Van Vollenhoven Institute* (Leiden University, 2013) <https://ssrn.com/abstract=2289123>.

[75] Supreme Court Decision 99/PK/TUN/2016.

[76] Central Java Governor Decision 660.1/17 of 2012 on Environmental Permits for Mining Activities for Semen Gresik Ltd.

[77] Ging Ginanjar, '"Penyelundupan Hukum" dalam Kasus Izin Pabrik Semen di Kendeng?' *BBC Indonesia* (20 March 2017).

The farmers and NGOs have since called on the president to order the governor to comply with the Supreme Court decision. In the wake of the decision, farmers put their feet in crates of cement in a protest in front of the presidential palace, replicating a protest that gained major media coverage in 2016.[78] The president asked the Minister of Environment to conduct a strategic environmental assessment, which recommended that the area be considered for classification as a protected area (*kawasan lindung*). The cement factory activities were thus suspended, pending further investigations. At the time of writing, this dispute was ongoing.

Disputes between licence-holders and the government about imposition of these penalties are heard in Indonesia's administrative courts. Licence-holders can also challenge administrative sanctions imposed upon them. This should commence with an internal administrative appeal before the superior of the official who issued the permit. However, icense-holders commonly bypass this process and sue in the administrative courts. An example of this resulted in Supreme Court Decision 693/K/TUN/2015, which dealt with a dispute between the Environment and Forestry Ministry and PT Merauke Rayon Raya, a forestry company. PT Merauke objected to the Forestry Ministry's cancellation of its forestry permit over 206,800 hectares in Papua. The ministry alleged that the company had not been performing the activities for which the licence had been granted, and had not met its financial obligations to the government. The company won at first instance and on appeal but the ministry's appeal to the Supreme Court succeeded.

The police hold primary authority to investigate allegations of environmental crimes but officials of government environmental agencies also have some investigatory powers. These civil investigators may, for example, verify environmental audits and other reports; inspect documents relating to environmental management; conduct onsite inspections; investigate alleged environmental crimes; collect evidence; enter property; take photographs or videos; and, in coordination with national police, even arrest and detain suspects (Article 94(2) of the EPML). Civil servant investigators can now also directly submit investigation reports to prosecutors for further action (Article 94(6)).[79]

The EPML prohibits violation of environmental quality standards, and imposes imprisonment of between three and ten years and fines of Rp 3–10 billion (Article 98(1)) for their breach. Higher penalties apply if the violation results in harm to humans or human health; and even higher penalties apply if serious injury or death results (Article 98(2)–(3)).[80] Lesser penalties apply for negligent violations (Article 99). Similar penalties apply for: improper management of toxic waste, including dumping (Articles 103–104); burning to clear land (Article 108);[81] operating without an environment licence (Article 109);[82] and preparing an EIA without certification (Article 110). The Law also imposes significant penalties on government officials who award environment licences without insisting the applicant produces an EIA, or a business licence without requiring an environment licence (Article 111).

Both criminal and civil environment-related cases are heard in Indonesia's general courts. Criminal liability does not extinguish civil claims brought by the individuals or communities affected by environmental damage. The Law imposes civil liability upon businesses that cause environmental pollution or damage to compensate those who suffer

[78] Suherdjoko, 'Kendeng Farmers Blockade Cement Factory' *Jakarta Post* (11 February 2017).

[79] Under the previous regime, they were limited to submitting their investigations to police, who would then decide whether the case should proceed to prosecution.

[80] Other sectoral statues and lower-level regulations also contain criminal provisions and penalties for breach. In Law 41 of 1999 on Forestry, for example, encroachment and clearcutting trees attract up to ten years' imprisonment and a Rp 5 billion fine. Law 4 of 2009 on Mineral and Coal Mining imposes up to ten years' imprisonment and a Rp 10 billion fine for certain types of illegal mining.

[81] Junaidi Hanafiah, 'Mahkamah Agung Kembali Tolak Kasasi PT. Kalista Alam, Ini Putusannya' *Mongabay* (23 August 2016).

[82] Firman Hidayat, 'Buka Lahan Tanpa Izin, PT. Kallista Alam Dihukum Penjara' *Mongabay* (16 July 2014).

loss as a result and to remediate any damage caused (Article 87(1)). While loss and causation must be proved in most cases, no fault liability applies in cases involving hazardous waste and serious environmental risks (Article 88).[83]

Those affected by the pollution or damage can bring a class action or an individual claim (Article 91(1)), and environmental organizations have standing to bring legal action on behalf of communities in such cases (Article 92(1)). To obtain such standing, the organization must be a legal entity focusing on environmental issues (as specified in its articles of association), and must have conducted environment-related activities for at least two years (Article 92(3)).[84] The government can even sue private parties that cause pollution or environmental destruction, to obtain compensation or to recoup environment rehabilitation costs (Article 90(1)).[85] This power has been often used in recent times to pursue those responsible for forest fires.[86] Importantly, community members can sue the government for violating environmental license issuance procedures (Article 93(1)), as happened, for example, in the *Kendeng* case.[87]

Environment-related litigation

Unfortunately, Indonesia's courts have not provided fora in which environment-related rights have been reliably protected and obligations upheld. An analysis of twenty-three cases in a 2011 study found, for example, that case resolution took from two to ten years and that plaintiffs lost 87 per cent of cases, primarily because they could not prove their claims.[88] The report concluded that plaintiffs were better off using mediation to obtain compensation for environmental degradation—almost two-thirds of the seventeen mediations studied resulted in companies paying compensation, and each mediation took only around a year. Nonetheless, bringing polluters to mediation took, on average, more than ten years from the commencement of the polluting behaviour. More recent data from the Environment and Forestry Ministry suggests that litigation generally results in compensation higher than mediation[89] but this appears not to consider the costs of bringing litigation, or difficulties in enforcing judicial orders.

Indeed, the courts have been considered so ineffective that NGOs have sought to convince the government to introduce specialized environmental courts and certified 'green' judges trained to handle complex environmental cases. However, there have been some notable exceptions, where courts have upheld environmental rights in the face of significant resistance from government and powerful corporations. This appears to have encouraged environmental lawyers and organizations, who have brought numerous lawsuits and continue to do so, particularly in the general and administrative courts.[90] Perhaps of most

[83] For an example of a case where no fault liability has been applied, see South Jakarta District Court Decision 456/Pdt.G-LH/2016/PN Jkt.Sel: Hasyry Agustin, 'Gunakan Strict Liability, Hakim Hukum Perusahaan Ini Ratusan Miliar' *Hukumonline* (8 February 2017).

[84] Some environment-related sectoral statutes also allow for public interest litigation. For example, Art 73 of the Forestry Law permits environmental organizations focusing on forestry conservation to bring representative actions against parties who cause forest degradation or pollution. Communities adversely affected by mining activities can also sue under Art 145(1) of the Mineral and Coal Mining Law.

[85] Unfortunately, the government is not required to allocate any compensation it might receive using this process to victims of the environmental damage. Indeed, the main purpose of this compensation is for environmental rehabilitation or conservation activities.

[86] Andi Saputra, 'Masih Ada 10 Gugatan, KLHK Diminta Teliti dan Jangan Sampai Lolos Lagi' *Detik News* (8 January 2016).

[87] Rosmiyati Dewi Kandi, 'Kisah Semen Indonesia Dua Kali Kalah Melawan Petani' *CNN Indonesia* (11 October 2016).

[88] Prayekti Murharjanti, 'Efektifitas Penyelesaian Sengketa Lingkungan Hidup di Indonesia' (Van Vollenhoven Institute, Leiden University and Bappenas, 2011).

[89] 'Menjaga Lingkungan, KLHK Terapkan Pengawasan dan Sanksi Berlapis' *Jawa Pos* (3 December 2016).

[90] 'Rakyat Harus Menggugat Korporasi Perusak Lingkungan' *Berita Hukum* (30 July 2013).

significance is that many lawsuits have now been launched against the government authority responsible for approving a project that has hurt the environment, or for otherwise failing to prevent environmental harm, rather than the direct perpetrator of the harm.

Citizen lawsuits

An important development has been the introduction of 'citizen lawsuits' (*gugatan warga negara*). Supreme Court Chief Justice Decision 36/KMA/SK/II/2013 on Guidelines for Handling Environmental Cases (*Pedoman Penanganan Perkara Lingkungan*) defines a 'citizen lawsuit' as:

> a lawsuit that can be lodged by any person in respect of a tort, in the name of the public interest, and because the government has either neglected [its responsibilities] or has not met its legal obligations.

Citizen lawsuits are to be distinguished from class actions, where the applicant represents other people or communities. Citizen lawsuits are also unique because the applicants cannot seek compensation; rather, they can only seek orders to compel government action, such as to stop pollution, provide healthcare, issue particular policies, and the like.

In September 2013, several residents from Riau Province, assisted by human rights and environmental organizations, lodged the first citizen lawsuit in the Central Jakarta District Court, against the government, including the president, the Minister of Forestry, the Minister for the Environment, and the governor of Riau. The applicants alleged that that government had been negligent by failing to take adequate action to prevent global warming, pointing to the June 2013 peat forest fires, and for issuing forestry production licenses in nature reserve regions.[91] They asked the Court to order the government to halt logging licences, reconsider logging licences in Riau Province, establish a greenhouse gas (GHG) inventory and allocate funds for GHG reduction in the provincial annual budget.

This case did not proceed to trial, because the parties[92] settled at mediation by a judge. The agreement reached was:

(1) the applicant would withdraw the lawsuit;

(2) the ministries would monitor and evaluate licences and issue sanctions to companies that breach the law; and

(3) the ministries would develop policies about the GHG inventory and emission reductions.

The parties appear to have followed this agreement, at least in part. Soon after the agreement was reached, the applicant duly withdrew the lawsuit[93] and Environment Minister Regulation 15 of 2013 on Valuation, Reporting, and Verification of Mitigation Action of Climate Change was issued.

In 2016, two other citizen lawsuits were launched against the government concerning forest fires. One was filed in Pekanbaru district court, in Riau Province. Like the 2013 citizen lawsuit, this was resolved by mediation, which yielded an agreement. The agreement stated that: all parties will actively help prevent and combat forest fires in Riau; the president and the Environment and Forestry Ministry will issue necessary enabling regulations as mandated by the EPML; national and provincial governments will make budget allocations for forest fire countermeasures; the health ministry and provincial government will

[91] Riyan Nofitra, 'Riau Residents to Sue SBY' *Tempo* (12 September 2013); Made Ali, 'Delapan Warga Gugat Presiden RI Akibat Kerusakan Alam di Riau' *Mongabay* (10 September 2013).

[92] Except the provincial government, which attended neither the trial nor the mediation process.

[93] Order 514/PDT.G/2013/PN.JKT.PST.

improve health services for those suffering from the fires; and the provincial government will develop an information system for forest fires.[94]

By contrast, the other 2016 lawsuit, lodged in Palangkaraya district court, Central Kalimantan, proceeded to trial and was the first forest fire case where the applicants successfully used the citizen lawsuit mechanism.[95] The applicants claimed that the defendants—the president, the Environment and Forestry Minister, the Agriculture Minister, the Health Minister, the head of the National Land Agency (BPN), the governor of Central Kalimantan, and the Central Kalimantan legislature—had not taken adequate measures to stop forest fires and, therefore, had negligently violated people's rights to a good and healthy environment. The applicants wanted the defendants to: issue necessary EPML implementing regulations, including on environmental carrying and supporting capacity and on environmental standards, instruments, rehabilitation, and risk analysis; establish a joint taskforce to review and monitor licences; enforce the law; develop an early response system and countermeasures for forest fire victims; establish a hospital and provide free healthcare for forest fire victims; develop a forest fire information system; and develop regional regulations concerning protected areas in Central Kalimantan Province. The court granted these requests.

CASE STUDY: SIDOARJO MUDFLOW

In May 2006, an explosion occurred at a natural gas drill site in Sidoarjo, East Java, close to Indonesia's second largest city, Surabaya. A volcano of steam, water, and mud began erupting out of the earth and flowing into surrounding agricultural grounds and villages. At its peak, the volcano had an eruption rate of 180,000 m^3 per day.[96] One estimate predicts that the mudflow, currently around 7 km^2, will continue for two decades.[97] About 13,000 families were forced to leave their homes,[98] and damage to infrastructure and the local economy has been significant.[99]

The Indonesian Legal Aid Foundation (*Yayasan Lembaga Bantuan Hukum Indonesia*, YLBHI) sued one company responsible for the drilling, PT Lapindo Brantas, and the government—including the president, the Minister of Energy and Mineral Resources, the Minister of the Environment, the oil and gas agency, the governor of East Java, and the regent of Sidoarjo county. The applicants alleged that the government had been negligent, including for failing to mitigate the harm when the flow commenced and failing to properly inform the public about the dangers of the mudflow. Also negligent, they claimed, was the government approval of the exploration that they claimed had caused the mudflow and failure to monitor compliance with technical guidelines. The remedy sought was for all victims to be restored to an equivalent or better position than prior to the mudflow. YLBHI also sought an order requiring the defendants to do everything they could to stem the mudflow. The claim was highly complex because of numerous defendants, all with different roles and responsibilities, and because different relief was sought for various classes of people, including those likely to be affected in the future.

The action was brought under Articles 1365–67 of the Civil Code—Indonesia's general civil liability provisions, discussed in Chapter 15. The application also mentioned various other laws, including the right to compensation from companies for environmental

[94] 'Gugatan Rakyat Melawan Asap Berakhir Damai' *Piramid News* (24 May 2016); 'Gugatan Rakyat Melawan Asap, Sidang Lanjut ke Mediasi' *Piramid News* (20 April 2016).

[95] Decision 118/Pdt.G/LH/2016/PN Plk.

[96] Richard J Davies and others, 'Probabilistic Longevity Estimate for the LUSI Mud Volcano, East Java' (2011) 168 *Journal of the Geological Society* 517.

[97] ibid. [98] ibid.

[99] Heath McMichael, 'The Lapindo Mudflow Disaster: Environmental, Infrastructure and Economic Impact' (2009) 45(1) *Bulletin of Indonesian Economic Studies* 73.

degradation or pollution, pointing out that strict liability applies if the company's activities have a major and significant impact on the environment.[100] The claim also referred to the Constitution, Law 39 of 1999 on Human Rights, and Law 11 of 2005 on Ratification of the UN Convention on Social and Economic Rights, focusing on the rights to life, the right to own property, and the right to self-development, among others.

In response, the defendants argued that the claimants had failed to prove losses suffered and to provide sufficient evidence against them (having relied almost exclusively on media reports). The defendants also claimed that potential litigants had been excluded and that aspects of the claim fell within the administrative courts' jurisdiction.

The Central Jakarta District Court accepted evidence that Lapindo had not exercised sufficient care when drilling, primarily because the drill casing used was inadequate.[101] However, the Court decided that the defendants were not liable to pay compensation, supporting this decision with very strange reasoning. For the Court, it was more appropriate to focus on the adequacy of relief efforts than whether Lapindo had been negligent when drilling, or the government when approving and monitoring the drilling activities. The Court held that the large amount of money that the defendants, including Lapindo, had already spent to deal with the disaster somehow constituted evidence that the defendants were *not* negligent. Of course, precisely the opposite inference is more convincing—that is, that paying significant compensation was implicit acknowledgement of fault. The case was appealed to the Jakarta High Court, and the Supreme Court[102] but was rejected, primarily because applicants had put forward no new facts to support the appeals.

Other proceedings have been commenced seeking redress for victims of the mudflow but have also been unsuccessful. Environmental NGO Walhi lodged a separate representative claim in the South Jakarta District Court in 2007, seeking a judicial order under Article 34 of Law 23 of 1997 on Environmental Management (the main environmental law at the time) to require the company and the state to stop the mudflow and to rehabilitate the environmental damage it had caused. However, the Court favoured defence expert witnesses, who testified that the flow was caused by a large earthquake in Yogyakarta, which occurred around 300 kilometres away only two days earlier, not by Lapindo's negligence.[103] Walhi was unable to adduce contrary expert evidence, primarily because it could not afford to do so.[104] This decision was upheld on appeal. In other proceedings, community members challenged the 2008 police decision to formally end investigations into the mudflow. The Court rejected this application, deciding that the police were within their rights to end investigations and had correctly followed relevant procedures.[105]

In 2007, President Susilo Bambang Yudhoyono issued a regulation requiring PT Lapindo Brantas to compensate some victims but payments have been slow.[106] Under the arrangement, Lapindo was held responsible to compensate victims and restore the environment within the confines of a 'impact area map', agreed upon by a National Team on the Sidoarjo

[100] Art 34(1), Law 23 of 1997.

[101] Central Jakarta District Court Decision 384/Pdt.G/2006/PN.Jkt.Pst.

[102] Jakarta High Court Decision 136/PDT/2008/PT.DKI; Supreme Court Decision 2710/K/Pdt/2008.

[103] 'Dinilai Akibat Fenomena Alam, Hakim Tolak Gugatan Walhi' *Hukumonline* (28 December 2007); 'Lapindo dan Pemerintah Digugat Lagi' *Hukumonline* (13 February 2007).

[104] Many others, however, argue that the Yogyakarta earthquake was too small and far away to have been the cause. They point to drilling without sufficient protective casing as the probable cause. See Richard J Davies and others, 'The East Java Mud Volcano (2006 to Present): An Earthquake or Drilling Trigger?' (2008) 272(3) *Earth and Planetary Science Letters* 627.

[105] Surabaya District Court Decision 07-Praper/PN-SBY/2010. See Laode Muhammad Syarif, Kadek Sarna, and Andri G Wibisana, 'Permasalahan Lingkungan Yang Penting', *Hukum Lingkungan: Teori, Legislasi dan Studi Kasus* (USAID, Kemitraan and The Asia Foundation) 25; Kukuh Wibowo, 'Gugatan Penghentian Penyidikan Kasus Lapindo Ditolak' *Tempo* (30 March 2010).

[106] Government Regulation 14 of 2007; Government Regulation 48 of 2008.

Mudflow Countermeasures, the East Java Provincial Government and Legislature, and the Sidoarjo District Government and Legislature. However, the mudflow ultimately expanded beyond this impact area, and the government accepted responsibility to pay for damage and loss occurring outside the map area. In 2012, three citizens petitioned the Constitutional Court, arguing that the national budget statute was unconstitutional because it allocated funds to pay compensation to victims of the mudflow. As citizens, they did not want their taxes used for this; rather, they argued, Lapindo should pay, because the damage was caused by its negligence. The Court rejected the application[107] but emphasized that the company remained responsible for the areas within the map.[108]

In 2013, the Constitutional Court heard another Sidoarjo-related application, this time brought by community members living within the map area. Some of those who lived outside the map area had received compensation from the state but the applicants had not, because Lapindo had not yet paid them. They, too, argued that the state budget statute was unconstitutional, this time because it caused injustice and violated the constitutional principle of legal equality. The Court agreed that dividing up liability based on the map had indeed caused injustice and inequality, and held that it was the state's responsibility to ensure fair and proper compensation for communities located within the impact map.

Some commentators interpreted this decision as requiring the state to guarantee Lapindo's obligation to pay the compensation[109] but others, including the Constitutional Court judges, contend that the decision merely requires the government to do everything within its power to ensure the company pays.[110]

Over a decade after the mudflow began, most of the compensation ordered by the 2007 Presidential Regulation has finally been paid. In late 2014, Lapindo said that it had paid Rp 3.03 trillion of the Rp 3.8 trillion that it owed to affected families but asked for government assistance to pay the remaining compensation due.[111] When it came to power, the Joko Widodo administration agreed to use state budget funds to assist Lapindo to pay the remaining compensation. At the time of writing, an estimated Rp 64 billion was still yet to be paid.[112]

Politics have 'muddied the waters' in the allocation of blame and the imposition of liability in this case. PT Lapindo Brantas is a subsidiary of the Bakrie Group, which is controlled by the family of Aburizal Bakrie, who was Minister for Social Welfare when the mudflow began.[113] Ironically, this ministry was primarily responsible for overseeing government efforts to assist the affected communities. A public figure with considerable political clout, Bakrie has since served as Chairperson of the Golkar Party (Soeharto's former political vehicle, which continues to fare reasonably well in national elections) and has long held presidential aspirations. Although he was one of Indonesia's richest men at the time of the eruption, Bakrie's business interests have struggled since the 2007–08 financial crisis. Heavily in debt, it was clearly in Bakrie's interests to minimize the compensation Lapindo paid to victims.[114]

[107] Constitutional Court Decision 53/PUU-X/2012.

[108] 'Putusan Tak Adil Mahkamah Konstitusi' *Tempo* (15 December 2012).

[109] 'MK: Pemerintah Jamin Pelunasan Kerugian Korban Lapindo' *Hukumonline* (26 March 2014).

[110] 'MK Lempar Bola Panas Ganti Rugi Lumpur Lapindo Kepada Pemerintah' *Tribun News* (4 April 2014).

[111] Fransisco Rosarians and Bobby Chandra, '3 Dalih Pemerintah Jokowi Talangi Utang Lapindo' *Tempo* (20 December 2014) <https://nasional.tempo.co/read/news/2014/12/20/078629943/3-dalih-pemerintah-jokowi-talangi-utang-lapindo>.

[112] Ihsanuddin, 'Sudah Bayar Rp 3,8 Triliun Untuk Korban Lumpur Lapindo, Pemerintah Masih "Utang" Rp 64 Miliar' *Kompas* (26 April 2017) <http://nasional.kompas.com/read/2017/04/26/18412711/sudah.bayar.rp.3.8.triliun.untuk.korban.lumpur.lapindo.pemerintah.masih.utang.rp.64.miliar>.

[113] Philip Drake, *Indonesia and the Politics of Disaster: Power and Representation in Indonesia's Mud Volcano* (Routledge 2016).

[114] Simon Butt, Hitoshi Nasu, and Luke Nottage (eds), *Asia-Pacific Disaster Management: Comparative and Socio-Legal Perspectives* (Springer 2014) 186.

PART III

CRIMINAL LAW

10

Substantive Criminal Law

INTRODUCTION

Indonesian criminal law today is a product of Dutch occupation. The earliest colonial legal code, the *Bataviasche Statuten*, was developed for the city of Batavia (now Jakarta) by the Dutch East India Company (*Vereenigde Oost-Indische Compagnie*, VOC), and was first promulgated in 1642 by the Governor General, Anthony van Diemen.[1] However, customary, or *adat*, law applied to Indonesians living elsewhere. In 1819, the Dutch administration decided that adat would be applied to all indigenous populations, even in Batavia.[2] Given the diversity of adat (discussed in Chapter 7), the result was a 'tangle of different legal and social footings',[3] with multiple separate legal jurisdictions operating across the archipelago, even in criminal matters. This pluralism created great complexity but Dutch administrators resisted calls to enact a single Criminal Code applicable to all, and in 1867 issued a Criminal Code that applied only to Europeans (the *Wetboek van Strafrecht*).

In 1872, a Criminal Code for 'natives' (*Strafwet voor Inlanders*) was introduced. This was predominantly based on the Code for Europeans (*Wetboek van Strafrecht*) although it included additional offences that applied specifically to 'natives'.[4] A pluralistic judicial system also evolved, where criminal cases involving indigenous people were tried in 'regional courts' (*landraden*, or 'land councils'). Cases involving Europeans were heard in the first instance residency courts (*Residentiegerechten*), six regional appellate courts, the councils of justice (*Raden van Justitie*), and the Supreme Court (*Hoogerechtshof*).[5] In 1914, the Dutch established a petty misdemeanours court (*landgerechten*) to hear cases involving Europeans and indigenous Indonesians. In this court, Europeans were always tried before a European judge.[6]

THE CODES

Criminal Code (KUHP)

In 1918, the Dutch enacted a new Code that applied to all ethnic groups: the *Wetboek van Srafwet Nederlandsch Indie* (WvS). This Code was applied until Independence in 1945 and was then adopted by the new Indonesian government, with very few changes, through passage of Law 1 of 1946 on Criminal Law ('the 1946 Criminal Law').[7] The main effects of this Law were to rename the WvS the 'KUHP' (*Kitab Undang-Undang Hukum Pidana* or

[1] Dutch presence in the archipelago was first established through the Dutch East India Company (*Vereenigde Oost-Indische Compagnie*, VOC), founded in 1602. In 1800, after the VOC went bankrupt, the Netherlands government took control of the VOC-administered colonies and the region became known as the Netherlands East Indies.

[2] See Art 121, *Reglement op de administratie der polite enz.*

[3] Robert Cribb, 'Legal Pluralism and Criminal Law in the Dutch Colonial Order' (2010) 90 *Indonesia* 47, 66.

[4] ibid 63.

[5] Daniel S Lev, 'Colonial Law and the Genesis of the Indonesian State' (1985) 40 *Indonesia* 57, 59.

[6] Cribb (n 3) 64; Amry Vandenbosch, *The Dutch East Indies: Its Government, Problems, and Politics* (University of California Press 1944) 193–94; Daniel S Lev, 'Judicial Unification in Post-Colonial Indonesia' (1973) *Indonesia* 1, 3.

[7] Art 1 states that Indonesia's criminal law is the law that existed on 8 March 1942. This date was chosen to 'reset' the criminal law to its pre-Japanese-occupation state.

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Criminal Code) (Article 6) and to replace each reference to the 'Dutch East Indies' with 'Indonesia' (Article 1). The KUHP was initially applied in Java and Madura,[8] and was extended to the remainder of Indonesia in 1958.[9]

Today, the KUHP remains the main source of Indonesian 'substantive' criminal law—that is, the definitions of various criminal acts and the penalties applicable to those who perform those acts. The procedural aspects of criminal law—including rules about police investigations, prosecutions and trials—are covered in the Criminal Procedure Code, or KUHAP, discussed in the following two chapters.

The KUHP has been amended several times, but never comprehensively. For example, in 1955, a statute was enacted to introduce new immigration offences.[10] In 1964, a presidential decision was issued specifying that the death penalty was to be carried out by shooting, not by hanging, as the KUHP had provided. The Decree also outlined various pre-execution procedures. At time of writing, this regulation remained in force.[11] In 1974,[12] the DPR amended two articles in the KUHP concerning gambling, increasing the maximum penalty to ten years in prison.[13] In 1976, several articles were inserted to extend the KUHP's provisions to criminal conduct on aircraft in Indonesian airspace.[14] More recently, in 1999, the DPR added several articles on 'crimes against state security'.[15] Article 107(a)–(e) prohibits the publication, broadcast, or spread of communist teachings, Marxism/Leninism, and the expression of a desire to overturn or abolish Pancasila as the national ideology. Article 107(f) prohibits damaging or destroying military or state facilities, or impeding state provision or distribution of essential goods. These provisions were added to fill a perceived gap left by the revocation of Indonesia's famously repressive anti-subversion law, which had long been used, particularly by the Soeharto regime, to quell opposition and imprison dissenters.

'Special' criminal laws

For the most part, reform to Indonesian criminal law has been achieved through the passage of 'special' (*khusus*) criminal law statutes that deal with specific crimes, rather than amendment of the KUHP itself. Most of these statutes have been enacted to provide more effective regulatory regimes for existing offences; others seek to respond to new problems or issues. Importantly, these special statutes generally replace any KUHP provisions dealing with the same subject matter. Many also alter the criminal procedures applied in the investigation, prosecution, and trial of the offences they describe, at least to the extent that they contradict the KUHAP. As we shall see in the next chapter, many special statutes seek to make investigation, prosecution, and trial of particular offences easier or more effective, including by giving police greater investigative powers, permitting civil servant investigators to assist police, allowing prosecutors to adduce a wider range of evidence, and allowing cases to be heard by ad hoc judges.

The subject matter of these specific-purpose criminal statutes are varied and include:

- economic crimes (Emergency Law 7 of 1955 on Investigation, Prosecution and Trial of Economic Crimes);
- subversion (Law 11/PNPS/1963 on Eradication of Subversive Activity, revoked by Law 26 of 1999);

[8] Art 17, 1946 Criminal Law. [9] Law No 73 of 1958.
[10] Emergency Law 8 of 1955 on Immigration Crimes.
[11] See later in this chapter for further discussion of the application of the death penalty in Indonesia.
[12] Law 7 of 1974 on Control of Gambling.
[13] Law 7 of 1974 also repealed a colonial ordinance on gambling (Staatsblad 230 of 1912, as amended by Staatsblad 526 of 1935).
[14] Law 4 of 1976. This Law added Art 479(a)–(r) to the KUHP. [15] Law 27 of 1999.

- road traffic (Law 12 of 1992);
- psychotropic substances (Law 5 of 1997);
- corruption (Law 31 of 1999, amended by Law 20 of 2001);
- terrorism (Law 15 of 2003 on Adoption of Interim Emergency Law 1 of 2002 on the Eradication of Terrorist Acts);
- pornography (Law 44 of 2008);
- narcotics (Law 35 of 2009);
- money laundering (Law 8 of 2010); and
- funding of terrorism (Law 9 of 2013).

Most statutes also create criminal offences including, among others, those contained in various human rights statutes and intellectual property laws. There are too many of these 'non-KUHP' offences to cover exhaustively in this chapter but we discuss many examples of them elsewhere in this book.

Regional criminal laws

Indonesia's many subnational legislatures can issue regional regulations (*Peraturan Daerah*) that create criminal offences. However, these powers are limited. For example, local governments cannot proscribe criminal punishments exceeding six months' imprisonment, and the KUHP will formally prevail in the event of any inconsistency. The complex problems created when regional regulations conflict with national laws are discussed in Chapter 3 of this book.

Traditional customary criminal law

During colonial times, adat (traditional customary law) was a primary source of both civil and criminal law followed by, and enforced against, the indigenous population. Its formal use as a source of criminal law was significantly reduced with the adoption of the WvS as Indonesia's Criminal Code, as discussed above.[16] Any doubts about the superiority of the KUHP over adat were dispelled by Emergency Law 1 of 1951.[17] As we explain in Chapter 7, there is now little scope for formal application of adat in criminal cases.[18] Generally, judges remain reluctant to apply adat in the cases they decide, because adat is often difficult to ascertain and culturally specific, exposing judges to the risk of intense criticism from local communities.

In 2007, the Constitutional Court emphasized the KUHP's superiority over adat, holding that customary law cannot be used to excuse culpability for a KUHP-prohibited crime, such as murder or attempted murder.[19] Adat can, however, be considered as a mitigating factor in sentencing. This constitutional challenge was brought by Muhlis Matu, a member of the South Sulawesi legislature who wanted to run for deputy mayor in Takalar, South Sulawesi. He had been prevented from standing because Article 58(f) of Law 32 of 2004 on Regional Government excluded candidates who had been convicted of an offence carrying a punishment of five years' imprisonment or more. Muhlis had been convicted of

[16] S Pompe, 'Between Crime and Custom: Extra-Marital Sex in Modern Indonesian Law' in T Lindsey (ed), *Law and Society in Indonesia* (1st edn, Federation Press 1999), 106.

[17] Emergency Law No 1 of 1951 on Provisional Measures for Furthering the Unity in the Judicial Organisation, Jurisdiction and Procedure of the Civil Courts.

[18] Some Indonesian judges even argue that Indonesian law should not recognize adat at all: Andi Saputra, 'Masih Ada 10 Gugatan, KLHK Diminta Teliti dan Jangan Sampai Lolos Lagi' *Detik News* (8 January 2016).

[19] Constitutional Court Decision No 14-17/PUU-V/2007.

attempted murder, a crime falling within this category. He claimed that it was an honour killing that his Bugis-Makassar culture required of him, to protect his family's dignity after one of its members was raped.[20] The court rejected this explanation, holding that 'cultural conflict between adat obligations and the provisions of criminal law cannot be accepted as a justification [for going beyond] the statute'.[21]

In 2007, the Supreme Court took a similar position in an appeal against murder convictions issued by the Pamekasan District and Surabaya High courts. The defendant had been convicted of the honour killing or *carok* of at least two people.[22] The Supreme Court decided that this was a serious offence that must be prosecuted under the KUHP, through the formal court system, regardless of whether adat required it.

Despite these cases, the position of adat within Indonesia's criminal justice system has not been finally resolved. As discussed later in this chapter, some have pushed for adat norms to be elevated in the revised draft Criminal Code (RUU KUHP), now under debate in the national legislature (*Dewan Perwakilan Rakyat*, DPR).

THE CRIMINAL CODE

The KUHP is divided into three 'books':

- Book I: General Provisions (Articles 1–103). This book relates to the application of the Code and includes general principles of criminal law.
- Book II: Crimes (Articles 104–488).
- Book III: Violations or Misdemeanours (Articles 489–569).

Book I: General Provisions

Article 1(1) of the KUHP establishes a fundamental principle of Indonesian criminal law found in all developed legal systems: criminal liability can be established only for conduct prohibited by law. Criminal laws cannot, therefore, operate retrospectively, so that if no applicable law exists when the act is committed, there can be no criminal culpability. However, if the applicable law is changed after that act occurred, then the most favourable of the pre- and post-conduct laws is applied to the defendant (Article 1(2)).

Indonesian criminal law applies to 'every person who commits a crime in Indonesia' (Article 2)—in other words, it applies in the entire territory of Indonesia, to citizens and non-citizens alike. This territory includes Indonesian airspace, territorial waters, and Indonesia-flagged ships and airplanes (Article 3).

The KUHP also purports to have some extra-territorial operation, subject to restrictions imposed by international law (Article 9). It applies outside Indonesia to citizens and non-citizens who commit crimes against the national security of Indonesia listed in Article 4. These include treason (Articles 104, 106, 107, 110, 111 bis (1)), rebellion (Article 108), and attacking the president or vice-president (Article 131). Also with purported territorial operation are crimes related to currency, stamps and marks issued by the Indonesian government (Article 4(2)); forgery of some types of documents (Article 4(3)); piracy and hijacking (Articles 438, 444–47, and 479(j)); and crimes that could jeopardize civil aviation safety

[20] 'MK: Kewajiban Adat Tak Bisa Jadi Alasan Pembenar' *Hukumonline* (14 December 2007).

[21] Constitutional Court Decision 14-17/PUU-V/2007, para [3.13], p 126.

[22] Supreme Court Decision 2281/K/PIS/2007. See also 'Carok Tambak Mayor Terancam Hukuman Mati' *Tribunnews.com* (1 February 2012); A Shohib, 'Sidang Kasus Carok di PN Bangkalan Berlangsung Ricuh' *Maduracorner.com* (1 April 2013); Myrdene Anderson and Glenn Smith (eds), 'Violence in Madura: The Interplay of Resource Culture and History' in Myrdene Anderson (ed), *Cultural Shaping of Violence: Victimization, Escalation, Response* (Purdue University Press 2004) 207.

(Article 479(1)(m), (n), and (o)). The Code also purports to apply extra-territorially to its own nationals who violate provisions of Chapter 1 and Chapter 2 of Book II and Articles 160, 161, 240, 279, 450, and 451 (Article 5(1)), which contain offences related to national security and crimes against the dignity of the president and vice-president.[23] The crimes of failing to uphold one's duty to defend the nation (Article 240), bigamy (Article 279) and piracy (Articles 450 and 451) also have extra-territorial effect. More expansively, the KUHP applies to Indonesian nationals who commit an act overseas that violates both the KUHP and the criminal law of the country where the act was committed (Article 5(2)). However, the death penalty cannot be applied against an Indonesian citizen for a crime committed outside Indonesia if the place where the crime was committed does not impose the death penalty for that crime (Article 6).

Attempt and inchoate offences

The KUHP contains provisions on inchoate offences, such as intent, attempt, and facilitation. Individuals who incite, compel, or are complicit in the commission of a crime, or who provide an opportunity, the means, or information for a crime to be committed, are to be punished as perpetrators and face the same penalties (Article 55(1)).

However, accessories, and those who attempt to commit a crime but do not complete it, generally face a sentence 'discount' of one-third less than the primary punishment that would apply had the crime been committed (Articles 53(2) and 57). Attempt to commit a serious offence (*kejahatan*, or felony) is punishable under the KUHP if intent is apparent from the commencement of performance of the offence, and failing to commit the offence was due to circumstances independent of the offender's own will (Article 53(1)). People are accessories if they intentionally help when the crime is committed, or provide the opportunity, means, or information to commit a crime (Article 56). For both of these inchoate offences, if the maximum punishment for the primary offence is capital punishment or life imprisonment, an attempt will attract a maximum punishment of fifteen years' imprisonment (Articles 53(3), 57(1)–(2)).

Complaint offences

Indonesian criminal law categorizes offences as *delik biasa* (normal offences) or *delik aduan* (complaint offences). *Delik biasa* are processed by the police regardless of whether or not a complaint is made by a victim or a third party. This means that if a victim reports a *delik biasa* to the police but subsequently withdraws that report, the police can still pursue the case. By contrast, *delik aduan* are only considered to be crimes if the victim or a third party reports those crimes to the police. Examples of such offences include: adultery (Article 284); sex with a female between the ages of twelve and fifteen years (Article 287); criminal defamation (Article 310); breach of confidentiality (Article 322); and abduction (Article 332).

Articles 72–75 describe the procedure for making complaints. Notably, the Criminal Code allows for the parents, spouse, or children of a deceased victim to make a report on his or her behalf (unless the deceased wished no complaint to be made) (Article 73). Minors under the age of sixteen years against whom a criminal act has been perpetrated need a parent or guardian to complain on their behalf (Article 72). Indonesian residents must file their complaint within six months of learning that the act was committed; those residing outside Indonesia have nine months (Article 74(1)). Once a complaint is lodged, a

[23] Arts 134, 136, and 137, which deal with defaming or insulting the president and vice-president, were invalidated by Constitutional Court Decision 013-022/PUU-IV/2006, discussed below.

complainant has three months to retract it if they wish the police to drop the case (Article 75). If the complaint alleges rape, Articles 72, 73, and 75 do not apply (Article 284(3)), and the complaint can be withdrawn before the trial commences (Article 284(4)).

Defences and aggravating factors

Chapter III of Book I outlines defences (*alasan pembenar*), and mitigating and aggravating factors. Offenders can neither be culpable nor punished if they have a mental illness (Article 44(1)), or if they were affected by duress (Article 48). For the duress defence to apply, the pressure must have been such that the defendant could not have avoided it[24] for example, in circumstances of physical and mental coercion, such that the defendant has little choice, if any, but to commit the crime. An example is where a defendant is forced to commit a crime under threat of being immediately shot.[25] Soesilo suggests that whether duress existed must be assessed by balancing various factors, including the degree of power the compeller had over the defendant; whether the defendant could have escaped or avoided the situation; and whether committing the act was a reasonable response considering the level of force or threat exerted.[26]

Offenders are not to be punished if they act to defend their own, or another person's, body, morality, or property against direct unlawful assault or immediate threat (Article 49(1)), even if that response is excessive (Article 49(2)). Other defences are that the act was required by statute (Article 50) or was required under an official order issued by a competent authority (Article 51).

The KUHP's criminal penalties can be increased by one-third in two circumstances. The first is where an official commits a punishable act and, in doing so, violates his or her official duties or uses the power, opportunity, or means granted by his or her office (Article 52). The second is where the offender uses the Indonesian flag when committing a crime (Article 52a).

Sentencing and punishment

The KUHP distinguishes between 'primary' and 'secondary' (or 'additional') punishments. Primary punishments include: capital punishment, imprisonment, confinement, fines, and 'closed detention',[27] which resembles house arrest (Article 10a). Additional punishments include the withdrawal of certain rights, forfeiture of specific property, and/or publication of the relevant judgment (Article 10b).

Imprisonment can either be for life or for a fixed period (Article 12(1)). This period may vary between one day and fifteen years, which can be extended to a maximum of twenty years if the offence attracts a potential death sentence or life imprisonment. A sentence exceeding fifteen years may be imposed for concurrent crimes or recidivism, or where the aggravating factors under Article 52, described above, apply (Article 12(3)). However, a 'fixed period' of imprisonment cannot exceed twenty years (Article 12(4)).

A unique type of punishment imposed in Indonesia is *kurungan*—'confinement' or light imprisonment. *Kurungan* can be for a maximum period of one year, or one year and four months in the case of concurrent crimes, recidivism, or aggravating circumstances (Article 18(1) and (2)). As discussed below, the KUHP allows a convicted person to choose

[24] Raden Soesilo, *Kitab Undang-Undang Hukum Pidana (K.U.H.P.) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal, Untuk Para Pajabat Kepolisian Kejaksaan Pamong-Praja Dsb* (Politeia 1974) 54.

[25] R Sugandhi, *Kitab Undang-Undang Hukum Pidana (K.U.H.P.) dengan Penjelasannya* (Usaha Nasional 1981).

[26] Soesilo (n 24) 54.

[27] Closed detention was added by Law 20 of 1946 and is expanded upon in Government Regulation 8 of 1948.

kurungan instead of paying a fine (Article 31(1)) and those unable to pay a fine will enter *kurungan* (Article 30(2)). *Kurungan* inmates are allowed certain privileges, including the '*pistole*' right, under which an inmate can improve his or her conditions, for example, by bringing in household goods, a television, mattress, or food at his or her own expense (Articles 20–23).

The KUHP stipulates that male inmates can be required to work during the term of their imprisonment, unless they are serving life imprisonment or they are unfit to do so (Articles 24–25).

Fines

Article 30 of the KUHP sets a minimum fine of Rp 3.75 (equivalent to US$0.0002). As mentioned, if the defendant cannot afford the fine, a judge can impose *kurungan*, though for no longer than six months, except in cases of concurrent crimes, recidivism, or aggravating circumstances, for which the maximum sentence is eight months (Article 30(2)–(5)). Payment of the fine immediately releases the offender from *kurungan* (Article 31(2)). Judges can consider time served when deciding the duration of *kurungan* or the amount of a fine (Article 33(1)).

Recent adjustments to fine amounts

As mentioned, the KUHP remains largely unchanged from the WvS enacted in 1918. The fines imposed by the Code are now miniscule because of inflation and various economic crises. The government increased the value of all fines in the early 1960s but did not increase them again, rendering them meaningless as punishments. [28]

Another problem is that the seriousness of some crimes—most conspicuously, theft—is determined by the monetary value of goods stolen. So, for example, Articles 362 and 364 of the KUHP state that those who steal goods worth more than Rp 250 (equivalent to about US$0.02) face a maximum sentence of five years' imprisonment. According to Article 364, crimes involving theft of goods valued at less than Rp 250 should be considered minor theft and attract a maximum sentence of three months' imprisonment.[29] Police have been criticized for overusing this provision to detain anyone accused of theft of items of very little value, including a few cacao pods, or a pair of plastic sandals.[30] Because Article 21 of the KUHAP allows police to detain anyone suspected of a crime carrying a sentence of five years or more, this led to high rates of pre-trial detention throughout Indonesia.[31]

In response to public dissatisfaction,[32] Supreme Court Regulation 2 of 2012 on the Adjustment of Fine Limits for Minor Crimes and Fine Amounts in the Criminal Code,

[28] Interim Emergency Law 16 of 1960 on Changes to the Criminal Code; Interim Emergency Law 18 of 1960 on Amendments to the Fine Amounts in the KUHP and in other Criminal Provisions in Force Before 17 August 1945, endorsed by the DPR as statutes through Law 1 of 1961 on Legalisation of all Emergency Laws Passed Before 1 January 1961 to Become Law.

[29] In most publicly available versions of the KUHP, Art 364 states that goods stolen must be valued at less than Rp 25 to be considered a minor crime. This value was amended by Government Regulation in Lieu of Law 16 of 1960 on Changes to the Criminal Code, increasing the amounts listed under Arts 364, 373, 379, 384, and 407 to Rp 250.

[30] Madina Nusrat, 'Duh … Tiga Buah Kakao Menyeret Minah ke Meja Hijau … ' *Kompas* (19 November 2009); Jason Tedjasukmana, 'Sandals and Solidarity: Why Indonesians Are Using Flip-Flops as Symbols of Protest' *Time* (6 January 2012).

[31] Leopold Sudaryono, 'Overcrowding Crisis' (2013) 113 *Inside Indonesia* <http://www.insideindonesia.org/overcrowding-crisis>.

[32] The elucidation (explanatory memorandum) to Supreme Court Regulation 2 of 2012 explicitly addresses the growing public frustration with the state's heavy-handed approach to petty crime. It states that 'the community finds it grossly unfair that such cases attract a sentence of five years in prison as described under Article 362, which they consider out of step with the value of the goods stolen'.

was issued. The Regulation notes that, between 1960 and 2012, the value of gold per gram increased by 10,000-fold, such that the previously stipulated limitation of Rp 250 should be increased to Rp 2.5 million. Accordingly, the regulation increased the threshold value mentioned under Articles 364 (minor theft), 373 (minor fraud), 379 (minor deception), 384 (minor deception by a seller), 407(1) (minor destruction), and 482 (minor buying and selling of stolen goods), from Rp 250 to Rp 2.5 million. The Regulation establishes that crimes involving theft of goods worth less than Rp 2.5 million should be referred to a first instance judge and heard as an expedited case (*acara pidana cepat*), under Articles 205–10 of the KUHAP.[33]

The 2012 Supreme Court Regulation increases the maximum fine for all other crimes described in the KUHP by 1,000-fold.[34] Article 4 of the 2012 Regulation instructs judges to consider these changes when sentencing but many do not do so. While the Regulation may have provided a short-term fix for inappropriately low fines, it does not provide an enduring solution such as by producing a formula that allows for currency fluctuation. We expect that the Regulation was intended as a stop-gap measure, in anticipation of a new Criminal Code, which, as discussed below, seeks to address this issue.

The death penalty

The death penalty is prescribed for several offences in the Criminal Code, and for narcotics, terrorism, corruption, and human rights offences under 'special' laws, discussed above. Despite being available for many offences, the death penalty has, since the collapse of the New Order, been used primarily in drug cases, and in some terrorism and premeditated murder cases.[35] What follows is a full list of offences that attract the death penalty under Indonesian law.

Criminal Code (KUHP)

The following crimes are punishable by death:

- Premeditated murder (Article 340).
- Aggravated robbery by two or more persons that results in severe injury or death (Article 365(4)).
- Extortion resulting in severe injury or death (Article 368).
- Piracy resulting in death (Article 444).
- Hijacking offences that result in death or destruction of an aircraft (Article 479k(2)).
- Sabotaging or tampering with an aircraft resulting in death or destruction of the aircraft (Article 479o(2)).
- Treason with intent to kill the president or vice-president or deprive them of their ability to govern (Article 104).
- Premeditated murder of the head of a friendly state (Article 140).
- Collusion with foreign powers intended to cause and resulting in hostilities; and assisting the enemy or prejudicing the state in time of war, such as through betrayal, destruction, or demoralization (Articles 111 and 124(3)).

[33] Art 2(2), Supreme Court Regulation 2 of 2012 on Fine Limits for Minor Crimes and Fine Amounts in the Criminal Code.

[34] With the exception of the crimes in Arts 303(1)–(2), because those offences had already been amended by Law 7 of 1947 on Gambling.

[35] 'Indonesia Passes Chemical Castration Law for Paedophiles' *BBC News* (12 October 2016); Dave McRae, *A Key Domino? Indonesia's Death Penalty Politics* (Lowy Institute 2012) 5.

Law 35 of 2009 on Narcotics

The following offences attract the death penalty:

- Unlawfully producing, importing, exporting, or distributing more than one kilogram or five branches of plant-form Category I narcotics[36] or more than five grams of non-plant Category I narcotics (Articles 113(2)); or more than five grams of Category II narcotics[37] (Article 118(2)).
- Offering to sell, selling, buying, helping to sell or buy, receiving, trading, handing over or receiving more than one kilogram or five branches of plant-form Category I narcotics or more than five grams of non-plant Category I narcotics (Article 114(2)), or more than five grams of Category II narcotics (Article 119(2)).
- Unlawfully using Category I or II narcotics on another person or providing another person with Category I or II narcotics to use, resulting in that other person's death or permanent injury (Articles 116(2) and 121(2)).
- Instructing, providing, inducing, providing an opportunity, suggesting, facilitating, threatening with force, threatening with violence, deceiving, or persuading any child under the age of consent to commit an offence described in Articles 111–26 or 129 (Article 133).

Article 89 of the 2002 Child Protection Law, discussed in Chapter 13, also makes the death penalty available for involving children in the abuse, production, or distribution of narcotics or psychotropic drugs.

The Corruption Law

One of the definitions of corruption is an 'unlawful' act to enrich oneself or another person or a corporation, thereby creating losses to state finances or the economy (Article 2(1)).[38] If this is perpetrated in 'particular circumstances', then the death penalty can be imposed (Article 2(2)).

The elucidation to Article 2(2) defines these 'particular circumstances' as:

> when the state was in a situation of danger in accordance with applicable statutes, when there is a national natural disaster, if there has been a repeat of a crime of corruption, or when the state is in a situation of economic and monetary crisis.

We discuss this provision, the concept of 'unlawfulness', and the Corruption Law more generally, in Chapter 14.

The Terrorism Law

Judges can impose the death penalty for the following acts:[39]

- Intentionally using violence or threats of violence, creating a widespread atmosphere of terror/fear or causing mass casualties, by taking the liberty or lives and property of other people, or causing damage or destruction to strategic vital objects, the environment, public facilities or international facilities (Article 6).
- Committing various offences relating to aviation safety and security (Article 8).

[36] Examples of Category I narcotics include opium, coca plant, cocaine, marijuana plant, heroin, methamphetamine, and MDMA.

[37] Examples of Category II narcotics include many opioid drugs, such as morphine, fentanyl, and methadone.

[38] Law 20 of 2001 Amending Law 31 of 1999 on the Eradication of Corruption.

[39] Law No 15 of 2003 on the Stipulation of Interim Emergency Law No 1 of 2002 on the Eradication of the Crime of Terrorism as a Statute.

- Illegally bringing into Indonesia, producing, accepting, obtaining, controlling, possessing, transporting, storing, using or taking from Indonesia: a firearm, ammunition, explosives or other dangerous materials with intent to perform an act of terrorism (Article 9).
- Inciting, planning, or assisting others to conduct terrorism offences (Article 14).

The 2000 Human Rights Court Law

Genocide and crimes against humanity can be punished by death.[40] We discuss this statute in Chapter 13.

Law 9 of 2008 on the Use of Chemical Products and Prohibition on the Use of Chemical Products as Weapons

The death penalty can be imposed for:

- using, developing, producing, obtaining, or storing chemical weapons;
- transferring chemical weapons to anyone;
- involving oneself in military preparations for the use of chemical weapons; and
- helping or persuading others to be involved in activities prohibited by this Law (Articles 14 and 27).

Law 31/PNPS/1964 on Atomic Energy

Officers of the National Atomic Energy Agency, and other institutions that use atomic energy, must keep all work-related information about atomic energy confidential. The maximum penalty for breaching this obligation is death (Articles 22 and 23).

Law No 12/Drt/1951 on Firearms

Death is the maximum penalty for importing, exporting, producing, receiving, obtaining, attempting to obtain, transferring or attempting to transfer possession of, carrying, storing, hiding, or using a firearm, ammunition or explosive (Article 1(1)).

Interim Emergency Law 1 of 2016 Amending the 2002 Child Protection Law

Following the national outcry over the rape and murder of a fourteen-year-old girl in the Sumatran province of Bengkulu, President Joko Widodo issued an interim emergency law in May 2016. This Law allows judges to impose the death penalty upon those who use violence, or the threat of violence, to force a child to engage in sexual relations (either with oneself or another person), if this involves multiple victims, or results in severe injury, mental disturbance, infectious disease, loss of reproductive function, or death. This emergency law was endorsed by the national legislature in October 2016, thereby amending the 2002 Child Protection Law and including the death penalty in Article 81(5).[41]

None of these provisions require judges to hand down the death penalty; its imposition is always discretionary.[42] Some laws seek to prevent its imposition where it would be otherwise available. For example, the 2012 Law on the Juvenile Justice System grants children the right not to receive the death penalty or a life sentence (Article 6(f)). Indeed, the maximum penalty is ten years for children found guilty of a crime for which the death penalty or life imprisonment could otherwise be imposed.[43] Despite this provision, Indonesian

[40] Arts 36–37, Law 26 of 2000 on the Human Rights Court.
[41] 'Indonesia Passes Chemical Castration Law for Paedophiles' (n 35).
[42] Simon Butt, 'Judicial Responses to the Death Penalty in Indonesia' (2014) 39(2) *Alternative Law Journal* 134.
[43] Art 81(6), Law 11 of 2012 on the Juvenile Justice System.

judges have, in fact, imposed the death sentence on minors.[44] Similarly, Article 44 of the Criminal Code states that offenders with a mental illness cannot be held responsible for a crime committed. Again, Indonesian judges appear to have sometimes ignored this restriction. For example, in 2015 Indonesia executed a Brazilian national—previously diagnosed with schizophrenia—for drug offences, defying harsh international criticism.[45] Pregnancy provides only a temporary reprieve from execution, which can be performed forty days after the woman gives birth.[46]

Execution process

Indonesian law does not stipulate a time limit within which an execution must take place after a court has imposed the death penalty. However, the Supreme Court has published a practice note indicating that prosecutors should give the condemned 180 days to file a reconsideration (PK) request or seek clemency. If the condemned does neither, the execution should take place.[47] The intent behind this was to prevent convicts from delaying their executions by suggesting that they intended to seek clemency or appeal, often without doing so, thereby drawing out the process. Although perhaps unintended, the ruling might also help bring an end to the practice of leaving prisoners on death row indefinitely, sometimes for decades, until prosecutors decide to execute. This has long been criticized as 'double punishment'—a term of imprisonment, with constant fear of impending execution, and then the execution itself.

Article 11 of the WvS established hanging as the execution method and *Staatsblad* 123 of 1945 changed this to shooting. The process and procedures for executions are set out in Presidential Decision 2 of 1964, which became Law 5 of 1969,[48] and a 2010 Chief of Police Regulation.[49]

Under these laws, prisoners are given seventy-two hours' notice of their execution. Dressed in white, they are transported with any co-offenders from prison at night to a remote location (often a forest or beach), accompanied by a religious adviser, if they wish. Their handcuffs are removed, their hands and legs are bound, and they are then tied to upright poles (often with cross-pieces) next to each other. They can choose whether to stand, sit or kneel for their execution, unless the prosecutor determines otherwise. They are given three minutes to 'calm themselves', again accompanied by a religious adviser if they wish. They are then offered blindfolds, and a doctor marks the position of their hearts in black on their clothes.

A firing squad of twelve officers stands between five and ten metres away. Only three of these twelve officers have live bullets; the rest have blanks. On the commander's signal, all twelve officers fire. If the prisoners still show signs of life, the commander shoots them above the ear. If still not dead, this finishing shot may be repeated until the doctor determines death has occurred. The corpse is then handed over to the deceased's family.

In 2008, three individuals sentenced to death for involvement in the 2002 Bali bombings—Amrozi bin Nurhasyim, Ali Ghufron bin Nurhasyim, and Imam Samudra—challenged the constitutionality of Law 5 of 1969.[50] Before the Constitutional Court, the applicants

[44] Singgih Soares, 'Indonesian Justice Tainted by Death Sentence against Minor' *Tempo* (22 March 2015).

[45] Jewel Topsfield, 'Mentally Ill Brazilian Rodrigo Gularte Fit to Execute: Indonesia' *Sydney Morning Herald* (20 April 2015).

[46] Art 7, Presidential Decision No 2 of 1964 on the Means of Implementation of the Death Penalty Imposed by the General and Military Courts.

[47] Supreme Court Chief Justice Directive on the Death Penalty, 029/KMA/III/2009 (17 March 2009). Art 69, Law 14 of 1985 on the Supreme Court (as amended by Law 5 of 2004 and Law 3 of 2009) sets a limit of 180 days for the filing of reconsideration requests.

[48] Presidential Decision 2 of 1964 on the Means of Implementation of the Death Penalty Imposed by the General and Military Courts.

[49] Art 15, Police Chief Regulation 12 of 2010 on the Implementation of the Death Penalty.

[50] See Constitutional Court Decision 21/PUU-VI/2008.

argued that being shot to death was equivalent to torture, because multiple shots might be required. (As discussed in Chapter 13, Article 28I(1) of the Constitution states that the right to be free from torture is a non-derogable right.)[51] The Court found, however, that execution by firing squad was not torture and that some pain was a 'logical consequence' of execution.[52] The Court recommended that a more 'humane' method be adopted but provided no suggestions.

Execution policy

The Indonesian government's approach to performing executions has been inconsistent.[53] Only three people were executed during Soekarno's presidency, all of them involved in an assassination attempt against him. For Soeharto's presidency (1966–98), data are only available for 1975–98, when there were forty-one executions: twenty-two for involvement in the 1965 coup, six for terrorism, and one for drug offences.[54] We note, too, that many thousands of people were executed extrajudicially by the military under Soeharto. Particularly notable are the purge of alleged communists after the 1965 coup and the covert state-sanctioned killings of criminals in the 1980s.[55] We discuss state-sanctioned extrajudicial violence in Chapter 13.

After Soeharto's fall, Indonesia was initially a low application, even reductionist, state, despite executions remaining popular with the public.[56] Between 1999 and 2014, twenty-seven people were executed, with executions peaking in 2008, when ten individuals were executed, including several involved in the Bali bombings. Former President Susilo Bambang Yudhoyono personally disliked the death penalty and, in 2008–13, Indonesia observed a de facto moratorium on its use, although this was never officially confirmed. In October 2012, Yudhoyono granted clemency to four narcotics criminals sentenced to death, including one foreign national.[57] Yudhoyono was pilloried for this decision, particularly by the State Narcotics Agency (BNN). In the thirty years before this, there was only one known case of a death sentence in a narcotics case being commuted through clemency.[58] We discuss clemency in more detail in Chapter 12.

The trend towards abolition, or at least reduction, seems to have been driven, in part at least, by large numbers of Indonesians facing the death penalty abroad. In recent years, the Indonesian government has faced increasing public pressure to protect Indonesian citizens on death row overseas, many of whom are reportedly domestic workers who have killed their employers following rape or abuse.[59] Under Yudhoyono, the government set up a highly effective taskforce to provide legal assistance to Indonesians on death row abroad. However, the government's bargaining position is severely compromised by continued application of the death penalty at home.[60]

[51] Art 28G(2) also provides freedom from torture.

[52] Constitutional Court Decision 21/PUU-VI/2008, para [4.2].

[53] The discussion in this section of death penalty policy draws on Timothy Lindsey and Penelope Nicholson, *Drugs Law and Legal Practice in Southeast Asia: Indonesia, Singapore and Vietnam* (Hart 2016) ch 2.

[54] Daniel Pascoe, 'Three Coming Legal Challenges to Indonesia's Death Penalty Regime' (2015) 2 *Indonesian Journal of International and Comparative Law* 239.

[55] '"Petrus" Gross Rights Violation' *Jakarta Post* (25 July 2012).

[56] Yohannie Linggasari, 'Mayoritas Publik Setuju Pengedar Narkotika Divonis Mati' *CNN Indonesia* (6 April 2015).

[57] Bagus BT Saragih, 'SBY Approves Clemency for 19 Drug Convicts' *Jakarta Post* (17 October 2012).

[58] McRae (n 36) 6.

[59] While many of them are indeed migrant workers, most Indonesians on death row abroad may, in fact, be narcotics offenders: Panca Nugraha, 'Many Indonesians on Death Row Abroad for Drug Charges' *Jakarta Post* (10 December 2013).

[60] In at least one case in Saudi Arabia, the government paid 'blood money' to have a sentence commuted to imprisonment: 'Blood Money Spares Indonesian Maid from Saudi Execution' *BBC News* (3 April 2014) <http://www.bbc.com/news/world-asia-pacific-26872447>.

Executions have increased since President Joko Widodo (Jokowi) took office in late 2014. Perhaps under pressure from BNN, which strongly supports the death penalty and publicly criticizes courts for failing to impose it,[61] Jokowi has publicly committed his government to a hard-line approach to drugs. He appears to genuinely believe that his country is in the grips of a drug 'emergency'[62] and sees the death penalty as a crucial element in the eradication of narcotics.[63] Between January and April 2015, fourteen people were executed. Almost immediately, the government then announced plans to execute a similar number.[64] Although fourteen executions were planned for the morning of 29 July 2016, ten inmates were given last-minute reprieves.[65] Nevertheless, it seems unlikely that those convicted of drug-related offences will be considered for clemency in the current climate.

At time of writing approximately 150 people were on death row in Indonesia.[66]

Books II and III: Offences

As mentioned, the KUHP is divided into three 'books', with Book II dealing with Crimes (Articles 104–488), and Book III Violations or Misdemeanours (Articles 489–569). In this section, we consider the offences from these books that tend to attract controversy.

Defamation

The KUHP still provides for criminal defamation, which is often used by powerful political or business figures to silence their critics. This is highly problematical from a democratic perspective and is discussed more fully in Chapter 21, as is defamation under Article 27(3) of Law 11 of 2008 on Information and Electronic Transactions.[67]

Briefly, Article 310 of the KUHP imposes up to nine months' imprisonment for 'anyone who intentionally attacks the reputation or honour of another person by alleging a certain fact, with the clear intention of making that fact publicly known'. If the attack is written, published, shown, or broadcast publicly, the sentence can increase to one year and four months. If a public official is defamed during performance of his or her duties, the penalty can be increased by one-third (Article 316). An allegedly offensive act will not be considered defamatory if done in the public interest or in self-defence (Article 310). Truth is not a defence, although proving it can assist a defendant to make out public interest or self-defence. If the defendant attempts to prove the truth of the allegation but fails, an increased term of up to four years' imprisonment can apply (Article 311).

Hate speech

Article 156 states that 'any person who publicly expresses animosity, hatred or insults against a group of Indonesian citizens, faces up to four years' imprisonment'. Here, 'group' refers to all groups in Indonesian society, based on differences of race, country of origin, religion, place of birth, descent, citizenship, or position according to the laws of the state.

[61] 'Hukuman Mati Dua Penyelundup Narkoba Asal Iran Dibatalkan' *Rappler* (20 April 2015) <http://www.rappler.com//world/regions/asia-pacific/indonesia/90562-hukuman-mati-dua-penyelundup-narkoba-asal-iran-dibatalkan>.

[62] Marwati, 'President Jokowi: Four State Problem Have [sic] to Be Resolved Immediately' *Universitas Gadjah Mada website* (Yogyakarta, Indonesia, 10 December 2014) <http://ugm.ac.id/en/news/9558-president.jokowi:.four.state.problem.have.to.be.resolved.immediately>.

[63] Dave McRae, '"Jokowi" and His Firing Squads' *Strategic Review* (September 2015).

[64] 'Jaksa Agung: Eksekusi Mati Tahap Tiga Setelah Lebaran' *Okezone News* (30 May 2016).

[65] 'Indonesia Executes 4 Inmates, 10 Get Reprieve' *The Straits Times* (30 July 2016).

[66] 'Pelaksanaan Hukuman Mati Tidak Akan Surut' *Media Indonesia* (23 May 2016) <http://mediaindonesia.com/news/read/46705/pelaksanaan-hukuman-mati-tidak-akan-surut/2016-05-23>.

[67] As amended by Law 19 of 2016.

Despite this wide definition, Indonesian police have rarely acted against perpetrators of hate speech.[68]

Prostitution

Prostitution is not explicitly forbidden under Indonesian law. The KUHP indirectly addresses it by prohibiting intermediaries from initiating or facilitating 'indecent activities' (*cabul*), and imposing a maximum sentence of one year and six months (Article 296). Similarly, Article 506 imposes *kurungan* of up to one year for those who profit from the prostitution of women. Law 21 of 2007 on the Eradication of Human Trafficking also creates offences for sexual exploitation (Articles 1–6 and 12).

Homosexuality

At the time of writing, homosexuality is not forbidden by national law, despite being condemned in some Indonesian communities. According to Article 292 of the KUHP, adults who engage in 'indecent activities' with a minor of the same gender face up to five years' imprisonment. This provision, along with Articles 284 on adultery and 285 on rape, was challenged before the Constitutional Court, which handed down its decision in late 2017.[69] The applicants—who included a conservative Muslim group called the 'Family Love Alliance' (AILA)—had asked the Court to change Article 292 so that it applied to indecent acts between people of the same gender, regardless of their age. A five-to-four majority rejected the request, deciding that it did not have jurisdiction to criminalize particular acts, because this was a matter for the legislature. The minority held that it would have allowed the application, because Indonesia is a religious state and all religions practised in Indonesia prohibit intercourse between people of the same gender.

'Sodomy' (*liwath*) and lesbian sex (*musahaqah*) are prohibited under Aceh's shari'a criminal code, the Qanun Jinayat, discussed below. Punishments for violations include up to 100 lashes with a cane, a fine of 1,000 grams of gold, or 100 months in prison (Articles 63 and 64). Also discussed below is the draft KUHP, which, if passed in its current form, could criminalize public affection between people of the same gender.

Blasphemy

Article 156a of the KUHP was inserted by the passage of Presidential Instruction 1 PNPS/1965 endorsed as a statute by Law 5 of 1969 (commonly called 'the Blasphemy Law'). Article 156a imposes up to five years' imprisonment for persons who publicly and intentionally express feelings or behaviour of hostility, abuse, or disparage one of the six recognized religions in Indonesia.[70] Although this provision has existed for half a century, it was used sparingly under the New Order regime. Since the fall of Soeharto in 1998, however, more than 120 people have been convicted for blasphemy.[71]

In 2009, a coalition of human rights and religious freedom activists challenged the constitutionality of the Blasphemy Law in the Constitutional Court.[72] The applicants argued,

[68] Prima Gumilang, 'Kapolri: Banyak Polisi Tidak Paham Ujaran Kebencian' *CNN Indonesia* (5 November 2015).

[69] Constitutional Court Decision 46/PUU-XIV/2016.

[70] The elucidation to Art 1 of the, Blasphemy Law states that the six recognized religions are Islam, Catholicism, Protestantism, Hinduism, Buddhism, and Confucianism but adds that others, such as Judaism, Zoroastrianism, Shintoism, and Taoism, are not prohibited.

[71] Melissa Crouch, 'Indonesia's Blasphemy Law: Bleak Outlook for Minority Religions' (2012) 146 *Asia Pacific Bulletin*.

[72] Constitutional Court Decision 140/PUU-VII/2009.

among other things, that the Blasphemy Law violated Article 28E of the Constitution, which provides that 'every person has the right to adhere to a religion and worship according to his or her religion'. They also objected to the Blasphemy Law providing a role for the state in determining orthodoxy for a religion.

The challenge prompted a heated national debate. Opponents of the challenge, which included Muslims, as well as members of the country's Hindu, Buddhist, and Confucian minorities, referred to Article 28J(2) of the Constitution, which provides that:

> in exercising his or her rights and freedom, every person must be subject to the restrictions stipulated in laws and regulations with the intention of guaranteeing the recognition of and respect for the rights and freedoms of other people and to fulfil fair demands in accordance with the considerations of moral and religious values, security, and public order in a democratic society.

On 19 April 2010, the Constitutional Court rejected the application, holding that Article 28J(2) was enough to justify the Blasphemy Law. In doing so, however, it mentioned that although the government only recognized six official religions (Islam, Protestantism, Catholicism, Buddhism, Hinduism, and Confucianism), it should 'leave alone' followers of other faiths.[73] This injunction has, unfortunately, done little to prevent attacks on those whose beliefs are seen as unorthodox.

Reform of the Criminal Code

The first few years after Soeharto's resignation witnessed a period of relative political openness, with citizens and activists able to criticize the president without fear of legal reprisal. However, government opponents soon once again began being targeted with the so-called '*lese majeste*' (injured majesty) provisions of the KUHP (Articles 134, 136, and 137), particularly during the Megawati Soekarnoputri presidency.[74] In 2006, however, the Constitutional Court ruled that these provisions were unconstitutional.[75] The Court held that the articles 'decreased the freedom to express thoughts and opinions, freedom of information, and legal certainty' and found that the penalties under Article 134 could be used to 'obstruct the process of democracy'.[76] The Court also noted that the provisions had been introduced by the Dutch for use against the indigenous Indonesian population during the colonial period and that it was, therefore, not appropriate that they be applied against citizens in independent Indonesia.

One year later, the Constitutional Court revoked Articles 154 and 155 of the KUHP, which the New Order had also used to restrict freedom of expression.[77] Article 154 had provided:

> Any person who publicly expresses feelings of hostility, hatred or contempt towards the Government of Indonesia faces a prison sentence of up to seven years or a fine of Rp 4,500.

Article 155(1), meanwhile, stated:

> Any person who publicly broadcasts, shows or displays writings or drawings that contain hostility, hatred or contempt towards the Government of Indonesia, with the intention that such

[73] Arghea Desafti Hapsari, 'Court Upholds Blasphemy Law' *Jakarta Post* (20 April 2010).

[74] Human Rights Watch, *Indonesia a Return to the New Order? Political Prisoners in Megawati's Indonesia* (Human rights watch (HRW) 2003); Human Rights Watch, *Turning Critics into Criminals: The Human Rights Consequences of Criminal Defamation Law in Indonesia*. (Human Rights Watch 2010) <http://www.hrw.org/en/reports/2010/05/04/turning-critics-criminals-0>.

[75] Constitutional Court Decision 013-022/PUU-IV/2006.

[76] Constitutional Court Decision 013-022/PUU-IV/2006, p 16.

[77] Constitutional Court Decision 6/PUU-V/2007.

> content becomes known by the public, faces a prison sentence of up to four years and six months, or a fine of Rp 4,500.

The Court held that both provisions:

> give rise to the tendency for abuse of power, because they can easily be interpreted according to the inclinations of authorities. A citizen who intends to deliver a criticism or opinion to the government—as is their right under the 1945 Constitution—could easily be accused of making a statement of 'hostility hatred or contempt' against the Government of Indonesia.[78]

The Constitutional Court also made a significant amendment to the KUHP when it removed the 'offensive treatment' offence (*perlakuan yang tak menyenangkan*). Originally, Article 335(1) stated that anyone who, 'with violence or threat of violence, forces another person to do or not do something, or allows something to happen, that is offensive to that other person or another person' faces one year's imprisonment or a fine of Rp 4,500. This provision was challenged in 2013 by a defendant accused of 'offensive treatment'. The Court decided that the concept was vague and subjective, and thus violated the constitutional right to legal certainty and broader concepts of justice.[79]

Various other provisions in the KUHP have been revoked through passage of specific laws mentioned earlier in this chapter. For example, the Corruption Law[80] repealed Articles 209–10 (on giving gifts to officials); Articles 387–88 (fraudulent behaviour by a contractor, buildings expert or supplier who thereby endangers people, goods, or the state during a time of war); and Articles 415–20, 423, 425, and 435 (offences perpetrated by officials).[81] Law 21 of 2007 on the Eradication of People Smuggling likewise revoked Article 297 of the KUHP (trafficking of women and underage boys); and Article 324 (slavery).[82]

Draft Bill for reform of KUHP

For decades, the government has considered replacing the KUHP and has produced various drafts for discussion. Most recently, the Joko Widodo administration submitted a draft KUHP (RUU KUHP) to the DPR in June 2015. The DPR included this, and a draft Criminal Procedure Code, in the list of priority bills for deliberation between 2015 and 2019 but there is no certainty they will be passed by then.

One reason for the slow pace of criminal law reform is the sheer size of the codes, which makes holding detailed or focused discussions difficult for the legislature. Previous iterations of these draft codes have sparked controversies over specific articles, which have also stalled negotiations. Their deliberation has also often been overtaken by more pressing legislation, and by political events. For example, the most recent attempt to deliberate a new code foundered in 2014, after the country, and the parliament, became preoccupied by legislative and presidential elections held that year.

The 2015 RUU KUHP contains 786 articles, which is considerably more than the KUHP's 569 articles, but is divided into two books instead of three. The first book contains general provisions (*aturan umum*); and the second covers criminal acts (*tindak pidana*), including both 'crimes' (*kejahatan*) and 'violations' (*pelanggaran*), to which the KUHP dedicated separate books.

In the following paragraphs, we discuss some of the more notable provisions of these two books, with the caveat that these provisions might be changed before enactment, if they are enacted at all.

[78] Constitutional Court Decision 6/PUU-V/2007, para [3.18.6], p 77.
[79] Constitutional Court Decision 1/PUU-XI/2013, para [3.16].
[80] Law 20 of 2001 Amending Law 31 of 1999 on Eradication of Corruption.
[81] Art 43B, Law 20 of 2001 on the Revision of Law 31 of 1999 on the Eradication of Corruption.
[82] Art 65, Law 21 of 2007 on the Eradication of People Smuggling.

Book I

Adat

One criticism of the RUU KUHP is that it increases legal uncertainty rather than reduces it. Article 1(1) resembles the current Code, stating that 'A person can only be convicted or charged if their behaviour is a criminal act as described in laws and regulations existing when the act was committed.' Article 1(2) appears to strengthen Article 1(1) by prohibiting the use of analogies to determine whether a criminal act has occurred. This seems designed to preclude law enforcement officials from broadly interpreting code provisions to capture criminal acts that are not explicitly prohibited, thereby increasing 'legal certainty'.

Article 2(1), however, seems to reverse this, by stating that Article 1(1) is not to 'reduce the effectiveness of 'living law' (*hukum yang hidup*) in the community, which can determine that a person should be punished, even though their acts are not prohibited by written law. The academic draft (*naskah akademis*) accompanying the RUU KUHP states that 'the inclusion of crimes based on living law, or what was previously known as customary (*adat*) law, is intended to satisfy the community's sense of justice'.[83] This provision seems to conflict with Article 1's more confined definition of criminal behaviour. As we show in Chapter 7, adat or 'living law' is dynamic, pluralist, and usually unwritten, thereby considerably increasing legal uncertainty. In short, Article 2(1) seems to require the identification of the 'living law', which is a highly fraught process, not least because 'living law' will rarely, if ever, be written. We fear that unpopular community members might face criminal allegations for violating adat principles that they did not know existed, or that were concocted by other community members or even law enforcement officials. The scope for abuse of Article 2(1) to criminalize otherwise legal behaviour seems very high.

The RUU KUHP mentions adat or 'living law' in other articles. Article 68 states that adat obligations can be imposed as standalone punishments and in addition to more conventional criminal punishments, such as incarceration or fines. Article 68(3) largely affirms Article 2(1), stating that adat punishments can be issued even for acts that are not proscribed as criminal acts. Similarly, Article 102 permits judges to enforce adat obligations or impose adat penalties—particularly if the act constitutes no crime elsewhere defined in the RUU KUHP—or instead to simply issue a fine or award compensation. The RUU KUHP also contemplates living law being a mitigating (Article 139(h)) or aggravating (Article 141(i)) factor in sentencing.

Penalties

The RUU KUHP introduces a new categorization of sanctions. The primary penalties, in order of severity are: imprisonment; confinement (*pidana tutupan*); supervised detention (*pidana pengawasan*); fines; and community service (Article 66). Community service can be substituted for offences carrying less than six months' imprisonment or a relatively minor fine (Article 88(1)). The maximum community service sentence is 240 hours for offenders over eighteen years and 120 hours for offenders under 18 (Article 88(4)).

Notably, the RUU KUHP no longer categorizes death as a primary penalty. It can be handed down 'as an alternative … as a last resort to "nurture" or "placate" (*mengayomi*) the community' (Article 89). Importantly, the RUU KUHP also establishes a ten-year probationary period for death sentences (Article 91(1)).[84] If an offender on 'death row' demonstrates good

[83] *Draft Naskah Akademik Rancangan Undang-Undang Tentang Kitab Undang-Undang Hukum Pidana* (National Law Development Agency, Ministry of Justice and Human Rights 2013).

[84] This probationary period may apply if: there is no strong community reaction, the convicted person shows regret and a desire to improve, the role of the convicted person in the crime was not especially important, or there are other mitigating factors (Art 91(1)).

behaviour during this period, exhibits remorse, and the public reaction to the crime is not too great, the sentence can be changed from death to imprisonment (Article 91(2)). In any event, execution can take place only after the president has rejected a clemency request (Article 90(1)). Even if the clemency request is rejected, if the death penalty has not been applied within ten years, the death penalty can be converted to a life sentence by presidential decision (Article 92).

Fines

The RUU KUHP overcomes the problem of having to regularly adjust the fine amounts in the Code. Article 82 prescribes six categories of fines:

- Category I: Rp 10 million.
- Category II: Rp 50 million.
- Category III: Rp 150 million.
- Category IV: Rp 500 million.
- Category V: Rp 2 billion.
- Category VI: Rp 15 billion.

Each crime that attracts a fine refers to one of these categories, rather than a specific sum, as in the original KUHP. Fine amounts in each category can be altered through government regulation (Article 82(7)).

Corporations

The RUU KUHP also introduces criminal sanctions for corporations (Article 48). A corporation can be held criminally culpable for the acts of persons holding functional positions in the corporation while working for the corporation or pursuing its interests in the field of business of that corporation (Article 49). If a corporation performs a criminal act, the corporation, its boards, and directors can be held responsible (Article 50).

The RUU imposes heavy fines upon corporations found guilty of criminal acts (Article 82). Any convicted person or entity unable to pay a fine within a court-specified period will have the fine taken from their income and assets (Article 84(2)). If this cannot be achieved, the RUU KUHP provides for revocation of a company's licence or even its dissolution (Article 87).

Book II

The RUU KUHP has been widely criticized for its preoccupation with 'moral' issues—for example adultery, cohabitation, and birth control. It is also problematic because it reinstates provisions that restrict freedom of the press and freedom of expression that were previously invalidated by the Constitutional Court.

Adultery

Article 284 of the existing KUHP, which regulates *zina* or adultery, only applies to married persons having intercourse with a person other than their husband or wife. The constitutionality of Article 284 was challenged before the Constitutional Court as part of the case involving Article 292 on same-sex intercourse, discussed above. The applicants had asked the Court to expand the definition of Article 284 to include any form of sexual intercourse other than between a married man and woman. A slim majority refused on the ground that expanding Article 284 involved norm reformulation, which was a task for the legislature.

The RUU KUHP expands the types of behaviour considered *zina* in the current Code. According to Article 484(1)(e), an unmarried man and an unmarried woman who have sexual intercourse face up to five years' imprisonment. This new offence is a complaint offence (*delik aduan*), meaning that an aggrieved third party must report it to police or prosecutors before charges can be laid (Article 484(2)). A complaint can be withdrawn, but only before court proceedings commence (Article 484(4)). Unmarried heterosexual couples who live together also face imprisonment of up to one year or a Category II fine (Article 488).

Homosexuality

Article 495 of the RUU KUHP, the so-called 'LGBT Article', has been one of its most controversial new provisions. As a result, it has undergone many changes during drafting but the most recent version seen by the authors would make it a criminal offence to perform 'indecent acts' (*perbuatan cabul*) with a person of the same sex in public, punishable by eighteen months' imprisonment or a Category II fine (Article 495(1)(a)). 'Indecent acts' with a person of the same sex that involve force, violence, or the threat of violence, or that are published in the form of pornography, would be punishable by nine years' imprisonment or a Category III fine (Article 495(1)(b)–(c)). If done with a person who was known, or should have been known, to be under the age of eighteen, they would be punishable by twelve years' imprisonment or a Category IV fine (Article 495(2)), or, if accompanied by violence or the threat of violence, 15 years' imprisonment or a Category V fine (Article 495(3)).[85] If passed in this form, the criminalization of indecent acts would probably extend to public affection between people of the same gender.

Birth control and abortion

The current KUHP restricts offering or promoting to minors devices intended to prevent or abort pregnancy (Article 283(1)). The RUU KUHP tightens these restrictions. Under Article 481, any person who displays a tool to prevent pregnancy, or broadcasts or displays information on how to obtain such a tool, faces a Category I fine. Article 482 provides for the same penalty for a tool or device to abort pregnancy. Article 483 states that officials engaged in family planning and sexual health programs are not subject to Articles 481 and 482.

Restrictions on abortion are more severe. A person who offers, or advises about, medication to terminate a pregnancy faces seven years' imprisonment or a Category IV fine (Article 501(1)). Offenders performing this act in the course of their duties can have their professional licences revoked (Article 501(2)). Doctors who perform abortions for medical reasons are exempted (Article 501(3)).

Freedom of expression

Democracy activists have expressed concern about the proposed reinstatement of provisions restricting freedom of expression. Any person who publicly insults the recognized government, resulting in disorder in the community, faces up to three years in prison or a Category IV fine (Article 284). The same punishment applies to any person who publicly broadcasts, shows, or displays writings, images, or recordings that insult the recognized government and result in disorder in the community (Article 285). These two articles essentially reintroduce Articles 154 and 155 of the KUHP, which the Constitutional Court invalidated in 2007.

[85] Kristian Erdianto, 'DPR-Pemerintah Belum Sepakat, Pasal LGBT dalam RKUHP Ditunda' *Kompas.com* (5 February 2017) <https://nasional.kompas.com/read/2018/02/05/20140041/dpr-pemerintah-belum-sepakat-pasal-lgbt-dalam-rkuhp-ditunda>.

Likewise, the RUU KUHP reinstates the '*lese majeste*' articles on publicly insulting the president or vice-president, which impose up to five years' imprisonment or a Category IV fine (Articles 263–64). As mentioned earlier, the Constitutional Court invalidated the equivalent KUHP provisions in 2006.

Freedom of the press

Human rights activists are concerned that the RUU KUHP will threaten press freedom. The draft introduces two particularly problematic articles. The first is Article 309(1), which prohibits the broadcasting and distribution of fabricated news resulting in disturbance or unrest in the community and imposes a sentence of up to two years in prison or a Category III fine for doing so. The second, Article 310, is more dangerous for journalists. It states that any person who broadcasts or distributes news that is unverified (*tidak pasti*), disproportionate or exaggerated (*berlebihan*), or incomplete (*tidak lengkap*), resulting in disturbance in the community, faces up to one year in prison or a Category II fine.

Crimes against national ideology

More than fifty years have passed since the bloody aftermath of the 1965 coup attempt, when hundreds of thousands of communists were killed and imprisoned and the Communist Party was destroyed. However, anti-communist discourse remains entrenched in Indonesia. One of the key tools used by the New Order regime in its campaign against communism was Provisional People's Consultative Assembly Decision XXV/1966, which prohibited the promotion of Marxism/Leninism. Despite periodic attempts to repeal the Decision, it remains in force in democratic Indonesia. The RUU KUHP contains several provisions that draw directly from this New Order relic.

Any person who publicly spreads or promotes—verbally, in writing, or through any other media—Marxism/Leninism or communist teachings, intending to alter or replace Pancasila as the state ideology, faces imprisonment for up to seven years (Article 219(1)). Heavier penalties apply if community unrest ensues (Article 219(2)). Establishing an organization based on communist teachings can result in a prison sentence of up to ten years (Article 220(a)).

Similarly, any person who publicly states an intention—verbally, in writing, or through any other media—to eliminate or replace Pancasila as the state ideology, faces up to five years in jail (Article 221(1)).

Religion

Finally, the RUU KUHP introduces increased restrictions on religion and religious life. Unfortunately, these largely follow the spirit of the Blasphemy Law, which, as mentioned, has been used in the post-Soeharto period to attack religious minorities and unorthodox groups.

Publicly insulting a religion in Indonesia can result in a two-year prison sentence or Category III fine (Article 348). If the insult is contained in a recording, document, or image for public dissemination, up to five years' imprisonment or a Category IV fine can be imposed (Article 349(1)).[86] Activists have expressed concern that 'a religion in Indonesia' will likely be interpreted as only protecting the six official religions, and then only the orthodox versions of them.

Lastly, any person who publicly incites violence, intending to eliminate an official religion in Indonesia, faces up to four years in prison or a Category IV fine (Article 350).

[86] This provision resembles Art 157 of the existing KUHP.

ACEH'S ISLAMIC CRIMINAL CODE, THE QANUN JINAYAT

The autonomous province of Aceh at the north-western tip of Sumatra island is the only Indonesian province authorized to implement Islamic criminal law. Aceh was the site of a powerful Islamic sultanate during the sixteenth and seventeenth centuries and the region continues to style itself as the 'Veranda of Mecca'. The Free Aceh Movement (*Gerakan Aceh Merdeka*, GAM) led a long-running armed separatist conflict in the province from 1976, motivated in part by resentment over Jakarta's exploitation of the region's rich natural resource wealth and human rights abuses by the military.[87]

In the post-Soeharto period, the central government offered varying degrees of autonomy to assuage the demands of the separatists. In 1999, a special autonomy law was passed, allowing the application of shari'a law for Muslims in the province, which the military saw as a bulwark against GAM.[88] The 2001 Special Autonomy Law gave the Acehnese even greater control over their own political and religious affairs, a greater proportion of the province's oil and gas revenues, and allowed the local legislature to formulate *qanun*, the local term for regional regulations.[89] Several were passed over the following years, regulating matters such as Islamic dress, gambling, alcohol and 'illicit proximity in seclusion' or *khalwat*.[90]

The signing of a memorandum of understanding between the Indonesian government and GAM leaders on 15 August 2005 (the 'Helsinki Peace Agreement'), following the devastation wrought in the province by the December 2004 Indian Ocean tsunami, effectively marked the end of separatist conflict. A key component of the peace deal was the grant of increased authority for Aceh to implement shari'a. Law 11 of 2006 on the Government of Aceh was enacted to implement the key aspects of the Helsinki Agreement.

In 2014, the Aceh People's Representative Council (DPRA, Dewan Perwakilan Rakyat Aceh) passed Qanun Aceh 6 of 2014 on Islamic Criminal Law (*Hukum Jinayat*). It came into force one year later, on 22 October 2015 (Article 75). Replacing previous *qanun* covering the same subject matter, it broadened the scope of Islamic criminal law applied in the province.

The Qanun Jinayat regulates Islamic law offences (*jarimah*) and punishments (*'uqubat*) (Article 3(1)), which may take the form of *hudud* (specific punishments mandated under Islamic law, in this case, caning) or *ta'zir* (a variable punishment left to the discretion of judges, which can include caning, fines, imprisonment, or restitution) (Article 4(1)(5)).

The Qanun Jinayat applies to Muslims in Aceh and business entities that operate within Aceh (Article 5). It applies to non-Muslims who conduct an offence together with a Muslim and choose to be subject to the Qanun. Perhaps most controversially, it also applies to non-Muslims in Aceh who commit offences that are regulated by the Qanun Jinayat but not national criminal law. Article 72 states that if an offence is regulated by the Qanun Jinayat and the KUHP, then the Qanun Jinayat applies. This directly violates the hierarchy of laws, which, as discussed in Chapter 2, clearly positions statutes (such as the KUHP) 'above' provincial regulations (such as the Qanun Jinayat).

[87] Edward Aspinall, *The Helsinki Agreement: A More Promising Basis for Peace in Aceh?* (East-West Center Washington 2006).

[88] Law 44 of 1999 on the Administration of Special Autonomy in Aceh; International Crisis Group, *Islamic Law and Criminal Justice in Aceh* (International Crisis Group (ICG) 2006).

[89] Aspinall (n 88).

[90] Michael Feener and Mark Cammack, 'The Islamic Legal System in Indonesia' (2012) 21(1) *Pacific Rim Law & Policy Journal* 13, 39.

Offences

The Qanun states that it is based on the principles of Islam, legality, justice and equality, welfare, protection of human rights, and community education (Article 2). Some of the offences and punishments it prescribes have raised considerable doubt about its adherence to some of these principles. The Qanun Jinayat is primarily concerned with moral issues, and contains graphic definitions of various sexual acts. It prohibits the following offences (Article 3(2)):

- Drinking, producing, storing, selling, importing, buying, carrying/transporting, or gifting alcoholic drinks (*khamar*), which are defined as drinks with an alcohol content of 2 per cent or more (Articles 1(20) and 15–17).
- Gambling (*maisir*) (Articles 1(21) and 18–22).
- *Khalwat*: 'seclusion': being alone (in an enclosed or private place) with a member of the opposite sex who is not a spouse or relative (Articles 1(22) and 23–24).
- *Ikhtilath*: 'intermingling': consensual intimate relations, such as flirting, touching, hugging, and kissing, between an unmarried male and female in a private or public area (Articles 1(23) and 25–32).
- *Zina*): any form of sexual intercourse outside marriage (Articles 1(25) and 33–45).
- Sexual abuse: immoral or obscene acts committed in public towards a male or female without his or her consent (Articles 1(26) and 46–47).
- Rape: 'using violence, force or the threat of violence to conduct a sexual act towards the vagina or anus of a victim, using the penis, mouth, or other object used by the perpetrator, or towards the mouth of the victim with the penis of the perpetrator' (Articles 1(30) and 48–56).
- *Qadzaf*: accusing someone of rape without being able to present four witnesses (Articles 1(31) and 57–62).
- Sodomy (*liwath*): consensual penetrative anal sex between men (Articles 1(28) and 63).
- Lesbian sex (*musahaqah*): a consensual act of two or more women involving mutual 'rubbing' of body parts or vaginas to obtain sexual pleasure (Articles 1(29) and 64).

Exclusions, defences, and aggravating factors

The Qanun Jinayat provides exclusions for these offences. For example, employees cannot be accused of *khalwat* with their colleagues at the workplace (Article 12(1)). Likewise, residents of a house cannot be accused of *khalwat* with other residents of the house if they are members of the same family or have village head approval, or equivalent, to live in the house (Article 12(2)). Similarly, any person who helps someone of the opposite sex during an emergency does not commit *khalwat* or *ikhtilath* (Article 13). The Code also excuses people who consume alcoholic substances as part of medication prescribed by a doctor (Article 14(1)). Accordingly, chemists, doctors, and hospitals cannot be accused of producing, buying, selling, or storing alcoholic substances (Article 14(2)).

The Qanun does not apply to officials performing their ordinary work functions (Article 9). Further, any person who commits an offence but did so under duress or suffers from a mental illness will not face punishment, unless the behaviour causes harm to others (Article 10). Those who participate or order (*menyuruh*) the commission of an offence face the same punishment as the perpetrator (Article 6(1)). Any person who intentionally 'promotes' (*mempromosikan*) an offence faces punishment one and a half times greater than the perpetrator (Article 6(2)). Meanwhile, any person who forces another person to commit an offence faces a punishment twice that of the perpetrator (Article 6(3)).

Sentencing and punishment

Several provisions on sentencing and punishment represent a significant departure from the KUHP. These include the following.

- The lightest discretionary (*ta'zir*) punishment that judges can issue is one-quarter of the maximum punishment.
- Offenders committing more than one type of offence can be punished for all offences committed (Article 65).
- If an offence is committed by a business entity, the perpetrator and the person in charge in Aceh face caning or imprisonment. Fines, meanwhile, can be issued to the company, perpetrator, and person in charge in Aceh (Article 8(1)–(2)).
- Government agencies must not issue permits or licences to places of accommodation, restaurants, or other places that facilitate the commission of offences described in the Qanun Jinayat (Article 70(1)). Any permit or licence issued in contravention of this prohibition is considered not to apply in Aceh (Article 70(2)).
- Any business entity that violates provisions of the Qanun Jinayat will have its licence revoked (Article 70(3)).

Punishments for these offences range from ten strokes of the cane, a fine of 100 grams of gold, or ten months in prison for *khalwat* (Article 23(1)), to 150–200 strokes, 1,500–2,000 grams, or 150–200 months for rape of a child or family member (Articles 49 and 50).

Critiques

Gender and human rights activists have criticized several provisions, in particular those related to rape. Rape victims must provide preliminary evidence when they submit their case to police. If police investigators determine that the evidence provided is insufficient, the victim can make an oath five times, which is said to 'strengthen' the evidence (Articles 52(3) and 53(1)). The first four times the victim must declare that she or he is honest and serious in her accusation, and the fifth time she or he must declare that she is willing to face God's wrath if she is lying (Article 53(2)(3)). If the victim is unwilling to state the oath in front of a court, he or she will then be considered to have committed *qadzaf*.

Meanwhile, those accused of rape can defend themselves simply by declaring their innocence with an oath five times. Like the oaths taken by the victim, the first four times, he or she declares that he or she is not guilty, and the fifth time that he is willing to receive God's wrath if he is lying (Article 55). If both the victim and accused take these oaths, both will receive no punishment (Article 56). These provisions clearly make it very difficult for a victim of rape to obtain justice: all the alleged perpetrator need do is deny it repeatedly.

The Qanun Jinayat does not appear to outlaw homosexuality, only particular sexual acts. There are, of course, many sexual acts that gay or lesbian people could continue to perform legally, if the definitions provided under the Qanun Jinayat are interpreted narrowly. Much will depend on how these provisions are applied, particularly by the *Mahkamah Syar'iyah*, the local branch of the national religious courts (*pengadilan agama*), which has jurisdiction over the offences created by the Qanun.

Compensation and rehabilitation

The Qanun Jinayat contains provisions allowing people wrongly accused of committing offences to claim compensation. This extends to wrongful arrests or detentions, erroneous applications of the law, and mistaken identities (Article 68(1)). A defendant who is declared innocent can also receive compensation (Article 68(2)). Compensation takes the form of

0.3 grams of gold or monetary equivalent for every day of detention (Article 68(3)). People who are wrongly detained or accused are also eligible for rehabilitation (Article 69).

Judicial challenge

On the day the Qanun came into force, the Institute for Criminal Justice (ICJR) lodged an application for its judicial review before the Supreme Court. The applicant made various compelling arguments for the invalidity of the Qanun, including that its adoption of caning as a punishment violated prohibitions on torture under the 1999 Human Rights Law and international law; and that oaths were not a valid form of evidence under national criminal procedural laws. ICJR also argued that the Qanun violated the national Lawmaking Law, discussed in Chapter 2, because it duplicated national laws and was internally inconsistent, thereby violating the hierarchy of laws and drafting rules. However, the Court refused to consider the merits of this application on a technicality, because the Lawmaking Law was under constitutional review before the Constitutional Court in an unrelated case.[91] The Supreme Court's unwillingness to simply sever those arguments from the application and to continue to hear the case on human rights and criminal procedure grounds seems to indicate a reluctance to perform its judicial review function, particularly in highly political or sensitive cases such as this one.

[91] Supreme Court Decision 60/P/HUM/2015.

11

Criminal Procedure

Pre-Trial

INTRODUCTION

Indonesia's Code of Criminal Procedure (*Kitab Undang-undang Hukum Acara Pidana*, KUHAP (Law 8 of 1981)) is the primary law dealing with criminal procedure, including the roles of the police and prosecutors, the law on arrests, warrants, detention, searches, legal aid, evidence, trials and appeals.

The Law divides criminal procedure into four distinct stages, which we discuss over two chapters. The first stage is the preliminary investigation (*penyelidikan*), to determine whether a crime has been committed.[1] The second is the primary investigation (*penyidikan*), to obtain more information and evidence of the crime, and identify a suspect or suspects.[2] The third stage is prosecution, where prosecutors prepare for, and then present, their case against the defendant before a court.[3] This is followed by the trial, at which a panel of (usually three) judges examines the case, decides whether the defendant is guilty or innocent and, if guilty, imposes a punishment.

In this chapter, we consider provisions of the KUHAP and other laws that regulate the pre-trial period, and the rights of suspects and defendants. We also consider other important stages in the criminal process, including pre-trial hearings (*praperadilan*).

In Chapter 12, which follows, we examine the trial itself, and the various stages of criminal appeal. We then discuss other issues of criminal process that have proven controversial over recent years, including clemency, remissions, parole, and extradition. Finally, we demonstrate how these provisions and processes work in practice, using the case of convicted drug smuggler Schapelle Corby as an illustration.

Several themes emerge from this discussion. First, these stages are generally treated as strict divisions—particularly as between primary investigation and prosecution. In practice, this has undermined cooperation between police and prosecutors and even heightened the long history of institutional rivalry between them.[4]

Second, the KUHAP is far from comprehensive. Many other statutes and regulations have been enacted to fill in gaps, or to provide more detail. There are, for example, specific statutes concerning the police,[5] the public prosecution,[6] and every branch of the courts, which bear on criminal procedure. Many special criminal laws (discussed in Chapter 10) have been enacted to deal with particular offences, and most of these contain their own criminal procedures that prevail over the KUHAP to the extent of any inconsistency. Various regulations cover other issues, such as clemency applications, remissions, and parole. Another source of criminal procedure law is the Constitutional Court, which has issued many important decisions in this area that are also discussed in this chapter. While it

[1] Arts 1(4), (5), 4, 5, and Chapter XIV Part 1, KUHAP.
[2] Arts 1(1), (2), (3), 6–8, and Chapter XIV Part 2, KUHAP.
[3] Arts 1(6), (7), 13–15, and Chapter XV, KUHAP.
[4] Benjamin B Wagner and Leslie Gielow Jacobs, 'Retooling Law Enforcement to Investigate and Prosecute Entrenched Corruption: Key Criminal Procedure Reforms for Indonesia and Other Nations' (2008) 30 *University of Pennsylvania Journal of International Economic Law* 183, 201–02.
[5] Law 2 of 2002 on the National Police.
[6] Law 16 of 2004 on Prosecution.

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is true to say that the KUHAP is the starting point for Indonesian criminal procedural law, this body of law is now found in a complex and diffuse range of sources.

Third, the KUHAP may look adequate 'on paper' but is often ignored in practice.[7] When first enacted, the KUHAP was heralded as a victory for human rights because it granted suspects and defendants procedural rights that they did not have under the previous law, which dated from the Dutch colonial era.[8] However, the KUHAP has not lived up to these expectations, partly because many of its provisions are vaguely worded and impose no sanctions for non-compliance by law enforcement officials. The same shortcomings apply to most of the other laws that bear on criminal process.

Finally, Indonesian criminal procedure law is now out-of-date and in urgent need of reform. Lawyers and activists have called for amendments to, or even replacement of, laws that make up Indonesia's criminal procedure law, including the KUHAP itself.

INVESTIGATION

As mentioned, investigations begin with *penyelidikan*—an initial stage at which police determine whether a crime has been committed. The KUHAP states that preliminary investigations are to be conducted by junior police investigators (Article 4). However, some special criminal laws authorize other state officials to conduct these investigations and to move on to primary investigations. For example, officials and employees of the National Narcotics Agency (BNN) and the Corruption Eradication Commission (KPK), have these investigatory powers.[9]

When undertaking preliminary investigations, investigators can generally receive reports and complaints about crimes, search for information and evidence, and stop people they deem suspicious to inspect their identification (Article 5(1)(a)). A primary investigator can: order junior investigators to arrest and detain a person; conduct body and property searches; seize documents; take fingerprints and photos; and bring a person before a prosecutor (Article 5(1)(b)).

If, after conducting these preliminary investigations, police believe that a crime was committed, the case will advance to the primary investigation (*penyidikan*) stage. Here, police gather evidence, identify suspects, question witnesses, continue crime scene investigations, and, if necessary, conduct crime scene reconstructions. Primary investigators have powers very similar to those possessed by preliminary investigators, without the need for approval by a more senior investigator. The primary investigator can call on experts to assist in the case; stop an investigation; or take other necessary action according to the law (Article 7). The KUHAP also allows assistant investigators to be appointed, if required (Articles 10–12).

Investigators compile a police report or dossier (*berita acara*) about the investigation, which contains details about: the interview of the suspect or witnesses; arrests; detentions; property searches and seizures; documents examined; crime scene assessments; relevant court rulings or determinations; and any other investigative activities (Article 75). This dossier is handed over to prosecutors. If prosecutors believe that the investigation is incomplete, they can return the dossier to the investigator, along with instructions about

[7] Daniel Fitzpatrick, 'Culture, Ideology and Human Rights: The Case of Indonesia's Code of Criminal Procedure' in Tim Lindsey (ed), *Indonesia: Law and Society* (1st edn, Federation Press 1999).

[8] Todung Mulya Lubis, *In Search of Human Rights: Legal-Political Dilemmas of Indonesia's New Order, 1966–1990* (Gramedia Pustaka Utama 1993). In 1926, the Dutch introduced the *Herziene Inlandsch/Indonesisch Reglement* (HIR), which regulated procedural law, both civil and criminal, but applied only to the islands of Java and Madura. A further statute was enacted in 1927 to cover the areas outside Java and Madura, known as the 'Legal Procedure Regulation for Areas Outside of Java and Madura' (*Rechtsreglement Buitengewesten* or Rbg).

[9] Art 70(i), Law 35 of 2009 on Narcotics; Art 6(c), Law 30 of 2002 on Corruption Eradication.

what further information is required (Article 110(2)). The investigation is considered complete if prosecutors do not return the dossier to the investigator within fourteen days (Article 110(4)).

The investigation process in detail

Any person who experiences or witnesses a crime, including a victim of that crime, can report it to investigators (Article 108(1)).[10] If a junior investigator receives such a report, or catches a person in the process of committing a crime, then he or she must commence a preliminary investigation. He or she must prepare a report for a primary investigator (Article 102), who then coordinates, supervises, and guides the junior investigator (Article 105). Likewise, any primary investigator who learns of, or receives a report or complaint about, an activity that could reasonably be suspected to constitute a crime must immediately investigate (Article 106). Before the investigation process begins, investigators must inform suspects about their right to legal counsel (Article 114). The police must report any investigations they commence to prosecutors. Similarly, if police stop an investigation, they must inform prosecutors, and the suspect or the suspect's family (Article 109).

The KUHAP empowers investigators to call suspects or witnesses for questioning. The request must clearly state the reason for questioning and give reasonable notice to appear. If the suspect or witness does not attend, the investigator can call the person to appear at another time, and order an official to bring the suspect or witness to him or her (Article 112). Investigators can also call on experts to assist their investigations (Article 120(1)).

While Indonesia has no formal plea-bargaining system, the police often exercise discretion when laying charges through an informal system called 'reserve cases' (*kasus cadangan*). Under this practice, police charge a suspect with only one of multiple potential crimes for which they may be responsible but reserve the right to press further charges to secure the suspect's cooperation. This usually takes place without court or prosecutor involvement.

As mentioned, once the investigation is complete, the investigator must hand over the case to prosecutors, who then examine whether sufficient evidence exists to prosecute. If the evidence is insufficient, prosecutors are to return the case file to police with a request for further information (Article 110(2)).

Role and function of the police

As discussed in Chapter 1, under Soeharto's New Order regime, the police were part of the Indonesian armed forces (*Angkatan Bersenjata Republik Indonesia*, ABRI), along with the navy and air force. Although officially the police were tasked with maintaining law and order, the military played a dominant role in internal security as well as external.[11]

Reform began in the early democratic period under President Bacharuddin Jusuf Habibie. In April 1999, the police were institutionally separated from the armed forces with the passage of People's Consultative Assembly Decrees VI and VII of 2000.[12] Responsibility for 'internal security' (*keamanan*) was given to the Indonesian National Police (*Polri*) and national 'defence' (*pertahanan*) retained by the Indonesian military, which was renamed the TNI (*Tentara Nasional Indonesia*). This reconfiguration was constitutionally enshrined in 2000.[13]

[10] Any person who knows of a plan to commit a crime that could affect public order and safety, threaten lives, or result in loss of property must report it immediately to an investigator (Art 108(2)).

[11] Rizal Sukma and Edy Prasetyono, 'Security Sector Reform in Indonesia: The Military and the Police' (2003) <http://www.clingendael.nl/sites/default/files/20030200_cru_working_paper_9.PDF>.

[12] MPR Decision VI of 2000 on the Separation of the Police and the Military; MPR Decree VII of 2000 on the Roles of the Police and the Military.

[13] Art 30(3)–(4), Constitution.

The functions of the police were further elaborated in Law 2 of 2002 on the Indonesian Police. The primary tasks of the police are to 'ensure the security and order of the community; uphold the law; and protect and serve the community' (Article 13). They also help non-police investigators—including special police, civil service investigators, and some private security operators—with their tasks; and conduct preliminary and primary investigations into all crimes (Article 14(f)–(g)).

Article 15 of the Police Law outlines the investigative authority of police. It comprises power to: receive reports and complaints; help resolve disputes between citizens that could interefere with public order; prevent and manage 'social illnesses' (a commonly used euphemism for immoral acts such as prostitution, drug use, alcoholism, gambling, and so on); monitor particular groups that could create division or threaten national unity and integrity; issue regulations about police administration; conduct special investigations as part of preventative police action; take action at crime scenes; take fingerprints and other forms of identification; photograph people; seek testimony and evidence; run the National Crime Information Centre; issue permits and documents necessary to serve the community; provide security assistance during court trials, for the implementation of judicial decisions, and for the activities of other institutions and the community; and receive and store lost property (Article 15(1)).

Police responsibility is also divided by administrative region. The national police (*kepolisian nasional*) has jurisdiction over all Indonesia; regional police (*kepolisian daerah*) in their provinces; 'resort police' (*kepolisian resort*) in counties and cities (*kabupaten/kota*); and sectoral police (*kepolisian sektor*) at the sub-district level.[14]

Arrest

The KUHAP allows police and other appointed state officials to arrest a person who is 'strongly suspected' of a crime, based on 'sufficient preliminary evidence' (Articles 16–17).[15]

In 1984, the Supreme Court Chief Justice, the prosecutor general, the Justice Minister, and the police chief decided that 'sufficient preliminary evidence' was a police report and one other piece of evidence.[16] Nevertheless, considerable debate remains about what evidence is sufficient and what is not.[17]

Arrest ordinarily requires a warrant, which must identify the person to be arrested, outline the suspected crime, and state the place of interrogation (Article 18(1)). The warrant need not be issued by a court—an order from a superior officer will usually suffice. Those suspected of less serious crimes (*pelanggaran*) can be arrested only if they have been called several times for questioning but failed to attend, without lawful excuse (Article 19(2)). The police must provide a copy of the warrant to the family of the person arrested 'immediately' following the arrest (Article 18(3)). Where an offender is caught in the act (*tertangkap tangan*), however, no warrant is required (Article 18(2)).

Article 18(3) was challenged in the Constitutional Court by Hendry Batoarung Ma'dika, who was detained by police for twenty-four days before a copy of the arrest warrant was provided to his family.[18] The Court held that 'immediately' should be understood as 'immediately, and no greater than seven days'.[19] For the Court, seventy-two hours was sufficient time to deliver a copy to the family but it decided that seven days was an appropriate

[14] Art 4, Government Regulation 23 of 2007.

[15] In the accompanying elucidation, 'sufficient preliminary evidence' is defined as 'preliminary evidence to suspect a crime' in accordance with Art 1(14).

[16] Chandra Hamzah, *Penjelasan Hukum (Restatement) Tentang Bukti Permulaan Yang Cukup* (Pusat Studi Hukum dan Kebijakan 2014) 9 <http://pshk.or.id/site/sites/default/files/Dokumen%20penelitian/Penjelasan%20Hukum%20Tentang%20Bukti%20Permulaan%20Yang%20Cukup.pdf>.

[17] ibid. [18] Constitutional Court Decision 3/PUU-XI/2013, p 4.

[19] Constitutional Court Decision 3/PUU-XI/2013, p 34.

period that could be applied uniformly across Indonesia, given the distances and variable geographic conditions across the country.[20]

Searches

The KUHAP permits primary investigators to search a suspect's body or house for the purposes of the investigation (Article 32). For house searches, investigators must first obtain a search warrant from the local district court chief judge (Article 33(1)). In urgent circumstances, however, investigators can, without a warrant, search the place where the suspect resides, the crime scene, and other relevant accommodation and public places (Article 34(1)). Unfortunately, however, the KUHAP does not clearly stipulate what constitutes an 'urgent circumstance', allowing police to simply determine that this precondition has been met, and search without a warrant.

The KUHAP allows junior investigators to search the clothing and possessions of persons that they strongly suspect are carrying items that should be confiscated (Article 37).

Confiscation

An investigator can only confiscate goods with written approval from the relevant district court. In pressing circumstances, investigators can confiscate movable objects but must immediately report this to that court for approval (Article 38). The following items can be confiscated:

- property suspected to have been partly or wholly obtained through criminal means;
- property used to commit or prepare for a crime;
- items used to impede a criminal investigation;
- items made to commit a crime; and
- other items directly connected to a crime (Article 39).

If a person is caught red-handed, investigators can confiscate items used, or suspected to have been used, to commit the crime, and other items with evidentiary value (Article 40).

Custody (temporary detention)

Detention is not mandatory under the KUHAP. Primary investigators, junior investigators (if ordered by a primary investigator), prosecutors, and judges can detain suspected offenders but only if the alleged crime is a specified offence (Article 21(4)(b)), or carries a penalty of at least five years' imprisonment (Article 21(4)(a)). The detention should also be supported by 'sufficient evidence' to 'strongly suspect' that the prospective detainee committed the offence and is likely to: not attend trial; damage or dispose of evidence; or repeat the offence (Article 21(1)). Detention can be: in a state facility; at home, under observation from authorities; or 'city detention', where the suspect must report to authorities at specified intervals (Article 22(1)–(3)).

The KUHAP specifies clear time limits for permissible detention during each stage of the criminal procedure, as shown in Table 11.1.[21]

Detention can also be extended by a further sixty days if the case being examined carries a penalty of nine years' imprisonment or more.[22] This extension can be sought during the

[20] Constitutional Court Decision 3/PUU-XI/2013, p 33.

[21] Other statutes provide for different limits of detention. Under Art 76, 2009 Narcotics Law, for example, State Narcotics Agency (BNN) investigators may detain a person for seventy-two hours, with the possibility of extension for a further seventy-two hours.

[22] The same extension is applicable if the suspect suffers from serious physical or mental illness, as evidenced by a doctor's certificate.

Table 11.1 Limits on detention under the KUHAP

Phase of criminal procedure	Limits of detention	Relevant legislation
Arrest and preliminary investigation (*penyelidikan*)	24 hours	KUHAP, Article 19(1)
Primary investigation (*penyidikan*)	60 days (20 days, extendable by 40 days)	KUHAP, Articles 20(1), 24
Indictment (*penuntutan*)	50 days (20 days, extendable by 30 days)	KUHAP, Articles 20(2), 25
Trial (*pemeriksaan*)	90 days (30 days, extendable by 60 days, with approval of a district court judge)	KUHAP, Articles 20(3), 26
Appeal	90 days (30 days, extendable by 60 days, with approval of a high court judge)	KUHAP, Articles 20(3), 27
Cassation	110 days (50 days, extendable by 60 days, with approval of the chief justice of the Supreme Court)	KUHAP, Articles 20(3), 28

investigation, prosecution, or trial stages, and must be ordered by a district court judge, a high court judge, or the Supreme Court, according to the stage the process has reached (Article 29).

Unfortunately, these time limits are honoured more in the breach than the observance. The processes described above present many opportunities for corruption, and widespread evidence exists of the abuse of the pre-trial detention process, with serious violations of human rights. As explained in Chapter 10, until recently, police were able to detain suspects in cases of suspected theft involving goods valued at more than Rp 250 (equivalent to about US$ 0.02). In 2012, the Supreme Court issued a regulation[23] raising the minimum threshold from Rp 250 to Rp 2.5 million (about US$ 200) but this is not always applied in practice.

During a visit to Indonesia in 2007, the UN special rapporteur on torture, Manfred Nowak, found that, as standard procedure, Indonesian police detained suspects for the full sixty days provided by Indonesian law for detention during primary investigations. This is much longer than permitted under international law.[24] He noted that prolonged detention not only increases opportunities for abuse but also gives time for signs of physical abuse to disappear before detainees are released or transferred. Nowak expressed concern that in many Indonesian prisons, pre-trial detainees and convicted prisoners are housed together, which is another clear violation of international standards.[25]

Reports of death in police custody are not uncommon, including deaths of minors.[26] Nowak heard many allegations of police torture and ill-treatment. He concluded that torture was 'routine practice' in police stations in Jakarta and other metropolitan areas of Java. Beatings even occurred during his visits to police stations in Yogyakarta, Wamena (in

[23] Art 1, Supreme Court Regulation 2 of 2012 on Adjustment of Limits for Minor Crimes and Fines in the Criminal Code.

[24] Manfred Nowak, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak: Addendum: Mission to Indonesia* (United Nations 2008).

[25] ibid 14.

[26] Ulma Haryanto, 'Police in West Sumatra Tortured Brothers to Death: Komnas Ham' *Jakarta Globe* (25 January 2012) <http://jakartaglobe.id/archive/police-in-west-sumatra-tortured-brothers-to-death-komnas-ham/>; Indra Budiari, 'Cleaners' Families Reveal Police Torture to Kompolnas' *Jakarta Post* (18 February 2015) <http://www.thejakartapost.com/news/2015/02/18/cleaners-families-reveal-police-torture-kompolnas.html>.

Papua) and East Jakarta.[27] He also received reports, corroborated by forensic medical analysis, of: beatings, including with wooden sticks, chains, iron bars, and hammers; kicking with heavy boots; electrocution; and shots fired into detainees' legs. Other reports have described sexual violence.[28] Detainees interviewed by Nowak reported that abuse was used primarily to elicit confessions or information on drug suppliers. In several cases, beatings were used to extract bribes.[29]

Bail

The KUHP permits bail under certain conditions. An investigator, prosecutor, or judge may, at the suspect's request, suspend or postpone detention. This can be accompanied by a personal or financial guarantee and conditions can be imposed on the release from detention (Article 31(1)). The general elucidation (explanatory memorandum) to the KUHAP provides examples of such conditions: regularly reporting to authorities (for example daily, or once every three days); and remaining at home or in a particular city. If these conditions are not met, then the suspension of detention can be revoked (Article 31(2)).

Government Regulation 27 of 1983 on the Implementation of the Criminal Procedure Code explains bail procedures. The relevant authority (which depends on the stage of the criminal process) determines the bail payable. The suspect or his or her legal representative must deliver the bail money directly to the district court clerk, who must confirm receipt of the funds. If the suspect flees, and cannot be found after three months, the money is transferred to the state (Article 35).

Anyone with a relationship to the suspect—including a legal representative or family member—can make a personal guarantee, by signing a statement indicating that they will pay a sum to the relevant authorities if the accused absconds. Again, if the suspect cannot be found within three months, the money is forfeited to the state (Article 36).

In practice, district court clerks are notorious for refusing to sign the confirmation receipt and return the funds once the case has concluded. According to some reports, bail money is often handed to investigating police officers or prosecutors, with the expectation that they will then deliver it to the court, although this rarely happens. Given these problems, legal aid organizations report a preference for personal guarantees.[30]

RIGHTS OF THE ACCUSED

The KUHAP contains procedural safeguards intended to protect the rights of suspects and defendants. These include the presumption of innocence, and the rights to legal counsel and to be free of the burden of proof. Some commentators have identified a major gap between procedural rules and actual practice, partly stemming from vague or inadequate regulations on important procedural issues.[31] This is detrimental not only to the rights of defendants but also significantly reduces the rigour and quality of police investigations.[32]

[27] Nowak (n 24) 12.

[28] Perkumpulan Lembaga Bantuan Hukum Masyarakat, 'Revealing the Practice of Violations of the Rights of the Accused during the Investigation Stage: Case Study of the Accused of Drug Offense in Jakarta' (LBH Masyarakat 2012) <http://lbhmasyarakat.org/admin/dataupload/Documentation%20on%20the%20Violation%20of%20the%20Rights%20of%20the%20Suspect,%20July%202012.pdf>.

[29] Nowak (n 24) 12.

[30] 'Penangguhan Penahanan dengan Uang Jaminan Perlu Diperjelas' *Hukumonline* (28 July 2005).

[31] See, for example, Robert R Strang, '"More Adversarial, But Not Completely Adversarial": Reformasi of the Indonesian Criminal Procedure Code' (2008) 32(1) *Fordham International Law Journal* 188, 197; Fitzpatrick (n 7).

[32] For example, there is no legislation or set of overarching rules authorizing police use of wiretapping, and they are known to use it without legal authority. This means that when police tap phones in investigations, they cannot use the evidence obtained in court but, at the same time, citizens whose privacy is violated have no recourse: Strang (n 31) 198.

Right to silence

The KUHAP does not grant a clear right against self-incrimination. Article 66 states that defendants do not bear the burden of proof but debate has arisen about whether this equates to the right to silence.[33]

Interrogation

Suspects have the rights to be interrogated promptly after arrest and to be clearly informed of the allegations against them in language they understand at the beginning of interrogation (Articles 50–51). During investigation and trial, they also have the rights to freely provide investigators, prosecutors, and the court with information and to use an interpreter at all times (Articles 52 and 53(1)).

The KUHAP also grants suspects the right to:

- contact and receive visits from:
  - a private doctor for health purposes, whether connected with the case or not (Article 58);
  - their family, household members, or anyone else whose assistance is required, who must also be informed of the detention by a relevant officer, so that [the suspect] can receive legal assistance or security for bail or for any other family or business purpose (Articles 59–61); or
  - a member of the clergy of any religion (Article 63);
- correspond with their family or legal counsel at any time and receive writing materials for this purpose. Officials may not examine this correspondence, unless those officials suspect that correspondence is being abused. If this happens, documents must be stamped and returned to suspects to indicate that they have been intercepted and scrutinized (Article 62);
- be tried in open court (Article 64); and
- present witnesses beneficial to their cause (Article 65).

Right to counsel

Once detained, suspects and defendants may contact their legal counsel, and foreign citizens can contact diplomatic representatives (Article 57). Suspects and defendants have the right to assistance from legal counsel of their choosing during investigations, and at every other stage of the criminal process (Articles 54–55). That legal representative must have access to the suspect or defendant at all stages. Investigators, prosecutors, and corrections staff must not listen in on any conversations or meetings held, unless the offence threatens national security (Article 71). The legal representative also has the right to access the police investigation report or dossier about the accused or defendant upon request and to send and receive letters on behalf of the accused (Articles 72–73).

The state must provide free legal assistance to persons accused of crimes that carry fifteen years' imprisonment or more, or the death penalty, and to those facing a sentence of five years or more who cannot afford legal representation (Article 56).

In practice, most detainees have no lawyer present during police questioning. This is partly because the police do not have to inform them of this right, so many are not aware of it.[34] Worse, some detainees report that police threaten violence or tougher penalties if they get a lawyer. Many detainees are said to succumb to this pressure, declining legal counsel, even if offered.[35]

[33] Fitzpatrick (n 7) 507. [34] ibid 508.
[35] Perkumpulan Lembaga Bantuan Hukum Masyarakat (n 28).

Legal aid reforms

Until the enactment of Law 16 of 2011 on Legal Aid (the Legal Aid Law), Indonesia had no strong legislative basis for legal aid. The Legal Aid Law was passed to give effect to the constitutional right to equality before the law and to guarantee access to justice.[36] It defines legal aid as 'legal assistance given by a legal aid provider free of charge' (Article 1(1)). Recipients of legal aid are people or groups without means to fulfil their own 'basic rights' to food, clothing, health, education, employment, or housing (Articles 1(2) and 5). Legal aid is to be provided for criminal, civil, and administrative matters, both litigious and non-litigious (Article 4).

To access legal aid, applicants must provide a 'proof of poverty' letter (*surat keterangan miskin*) from the *lurah*, the head of their village, or another local official (Article 14(1)). Other documents can be submitted to demonstrate the applicant's inability to cover his or her own basic costs.[37] The applicant must submit this letter to a legal aid provider, which must respond in writing within three days, informing the applicant whether it accepts the request. Reasons must be provided for a refusal (Article 15). The legal aid provider must be an accredited body with a permanent office and organizational structure (Article 8(2)).

The Law and Human Rights Ministry oversees the delivery of legal aid and its funding. The Minister has established a committee to oversee the administration of the scheme, verify the elibigility of recipients and accreditation of providers (Articles 6–7). Lawyers who give legal aid must renew their accreditation every three years (Article 7(3)). They must not receive money from a client, or any other party, for handling a legal aid case (Article 20).[38] The government must allocate a portion of the annual budget to legal aid (Article 17) but how the amount should be calculated and the funds distributed is not specified.

The roll-out of the new legal aid system has not been smooth but it is too early to evaluate the system. The Australia–Indonesia Partnership for Justice, an Australia-funded aid facility, collaborated with the Law and Human Rights Ministry to support the accreditation process, and in July 2013, former President Susilo Bambang Yudhoyono invited 310 accredited organizations to sign funding agreements at the Presidential Palace.[39] Resources are, however, stretched thin. Accredited legal aid organizations are not evenly distributed across Indonesia, with only 22 per cent of Indonesia's 508 counties and cities currently home to one. Even if all the legal aid organizations that applied to the Ministry in 2012 were successfully accredited, 338 counties would not have one.[40] A 2012 World Bank survey revealed that only about 1,000 legal aid lawyers practice in Indonesia but their potential client base is around 120 million, which, on some measures, is the approximate number of Indonesians living on less than US$2 per day.[41]

The only viable medium-term solution is for accredited legal aid organizations to provide services in more than one county, although obviously any increased load puts these organizations under significant strain. Together with initiatives such as mobile legal clinics, paralegals can also be an effective way for legal aid organizations to expand their coverage and ensure more citizens can access their services. The Ministry has floated the idea of

[36] See Preamble, part (a).

[37] The recipient can make a verbal request if unable to submit a written request (Art 14(2)).

[38] The maximum penalty for this is one year's imprisonment or a Rp 50 million (US$ 4,400) fine (Art 21).

[39] 'Free Lawyers for Indonesia's Poor' *Australian Government AusAID* (2 August 2013) <http://www.ausaid.gov.au/HotTopics/Pages/Display.aspx?QID=1230>.

[40] Justice for the Poor, *Legal Aid Organisations in Indonesia: A Survey of 230 Legal Aid Organisations* (The World Bank and The Ministry of Law and Human Rights 2014) viii.

[41] Australian Embassy Indonesia, 'Australia Supports Indonesia's First Ever Legal Aid System' *Press Release* (26 July 2013) <http://indonesia.embassy.gov.au/jakt/MR13_029.html>.

'one village, one paralegal' in anticipation of significantly greater financial resources being available under the new Village Law.[42] While this would face enormous practical difficulties if adopted as official policy, it signals openness to initiatives aimed at increasing the number of paralegals and improving their skills.

Another problem is that most of the funding the Ministry allocates to legal aid organizations is earmarked for litigation. The reimbursement-based funding system creates an additional obstacle to accessing the small percentage of funding allocated for non-litigious activities, including training, which is a requirement of being a provider. Obtaining reimbursement takes significant time and effort, and anecdotal evidence suggests that many poorly resourced legal aid organizations cannot pre-finance training and therefore cannot access government funding. Even if they could, reimbursements amounts are unlikely to be sufficient to cover their costs.

While the government knows of these problems, fixing the system will not be quick or easy. There may be other sources of funding, for example, under regional regulations on legal aid or through institution-specific budgets for legal aid, but it is likely training will, unfortunately, remain underfunded in the medium term.

CHALLENGES TO ARREST OR DETENTION

One of the KUHAP's most heralded reforms was the introduction of pre-trial hearings (*praperadilan*) (Articles 77–83). This mechanism allows a suspect, his or her family, or legal counsel to challenge the legality of an arrest or detention, such as where an arrest was made without a valid warrant (Articles 77 and 79). It has been loosely compared to the principle of *habeas corpus* in common law countries but is much narrower and more restricted.

A single judge hears the challenge and must reach a decision within ten days of the application being made (Articles 78 and 82(1)). Importantly, there is no right of appeal from a pre-trial determination to a high court or the Supreme Court, and if an issue relating to arrest or detention is not raised in a pre-trial hearing, courts usually refuse to allow it to be raised at trial.[43] If the *praperadilan* judge finds the arrest or detention to be unlawful, then the accused is released (Article 82(3)(a)). A suspect or accused person can obtain compensation for unlawful detention (Article 95)[44] but this is rarely received.

Scholars have documented serious shortcomings with the pre-trial hearing process in practice. Chief among these is that any complaints about arrest or detention are first lodged with the police—the subject of the complaint.[45] Further concerns include an undersupply of lawyers, especially in rural areas, and detainees being intimidated by police into not seeking legal counsel,[46] even though they are entitled to legal counsel, as discussed above. Also, police officers are not explicitly required by law to attend pre-trial hearings. Some officials therefore fail to appear, causing delays to proceedings; others appear only after trials have started, by which stage the legality of arrests and detentions can no longer be contested. Finally, because pre-trial hearings are decided by a single judge and determinations cannot be appealed, standards of decision-making are generally low, with outcomes notorious for lack of uniformity and predictability.[47]

Under Article 80 of the KUHAP, investigators, prosecutors, or interested third parties can also challenge the termination of investigations or prosecutions through *praperadilan* proceedings. This avenue is intended as a check on the power of police and prosecutors

[42] Law 6 of 2014 on Villages.
[43] Fitzpatrick (n 7) 506.
[44] See also Arts 77(b) and 81.
[45] Fitzpatrick (n 7) 506.
[46] ibid; Perkumpulan Lembaga Bantuan Hukum Masyarakat (n 28).
[47] Fitzpatrick (n 7) 506.

to drop cases, which they have often done in controversial circumstances, raising concerns about bribery.[48] In May 2013, the Constitutional Court expanded the class of applicants who can challenge a termination.[49] In this case, the Indonesian Anti-Corruption Community (*Perkumpulan Masyarakat Anti Korupsi*, MAKI) challenged the constitutionality of Article 80, citing the South Jakarta district court's regular refusal to allow them to challenge terminations of investigations into corruption suspects using *praperadilan* proceedings, on grounds that MAKI was not an 'interested third party'.[50] The Court held that the phrase 'interested third parties' (*pihak ketiga yang berkepentingan*) must be interpreted broadly, beyond just victims or informants to also include non-governmental and community organizations.[51] This recognized that many NGOs strive to operate in the 'public interest'.

In 2015, the Constitutional Court expanded the matters that can be challenged in pre-trial motions, to allow applicants to challenge the legality of being formally named a suspect by law enforcement officials.[52] Formally upgrading the status of a person of interest to a 'suspect' has important implications, discussed below. While Constitutional Court Decision appears to be sound, we note that it has been subsequently used by alleged corruptors to challenge their being named a suspect, successfully in some cases.[53]

Being named a suspect

In Indonesia, being 'named a suspect' is loosely equivalent to being charged in common law countries. Article 1(14) states that a 'suspect' is a person who, based on preliminary evidence, is suspected of committing an offence. Police Chief Regulation 14 of 2012 on the Management of Criminal Investigations repeats the definition (Article 1(10)) and defines 'preliminary evidence' as a police report and one other piece of legal evidence (Article 1(21)). Once named a suspect, a person will be further investigated and prosecuted, depending on the weight of the evidence police obtain. Investigations are not time limited, so once a person is named a suspect, they will usually be under investigation until police issue a formal directive (an SP3 or *Surat Perintah Penghentian Penyidikan*)[54] to stop it. An investigation can be stopped if: there is insufficient evidence; the act committed was not a crime; or for legal reasons (*demi hukum*) if: the suspect dies; if the limitation period for the offence (*kedaluwarsa*) has passed; the complaint is revoked (for *delik aduan* cases); or a judge has already made a legally binding decision in relation to the same act (Article 76 of the Regulation; Article 109 of the KUHAP).

[48] We discuss problematic aspects of the so-called 'SP3 power' to drop investigations and prosecutions in Chapter 14.

[49] Constitutional Court Decision 98/PUU-X/2012.

[50] 'Kejaksaan Akui Legal Standing LSM' *Hukumonline* (23 January 2013) <http://www.hukumonline.com/berita/baca/lt50ff8b8824e42/kejaksaan-akui-ilegal-standing-i-lsm>; 'MK Tegaskan LSM Bisa Ajukan Praperadilan' *Hukumonline* (21 May 2013) <http://www.hukumonline.com/berita/baca/lt519b604ebe2e3/mk-tegaskan-lsm-bisa-ajukan-praperadilan>.

[51] See para [5.1] of 98/PUU-X/2012. Note that the inclusion of NGOs in the understanding of 'interested third parties' was also considered in Constitutional Court Decision 76/PUU-X/2012 but that application involved an attempt to limit the meaning of that phrase, which was rejected because the court viewed it as wide enough to encompass NGOs.

[52] Constitutional Court Decision 21/PUU-XII/2014.

[53] 'Former Makassar Mayor Wins Pre-Trial Court Decision' *Jakarta Post* (12 May 2015) <http://www.thejakartapost.com/news/2015/05/12/former-makassar-mayor-wins-pretrial-court-decision.html>; Bagus BT Saragih, 'Hadi's Pre-Trial Victory a 'Disaster' for KPK' *Jakarta Post* (26 May 2015) <http://www.thejakartapost.com/news/2015/05/26/hadi-s-pretrial-victory-a-disaster-kpk.html>; Rifqi Assegaf, 'Pretrial Hearings: Who Will Fix the Mess?' *Indonesia at Melbourne* (7 July 2015) <http://indonesiaatmelbourne.unimelb.edu.au/pretrial-hearings-who-will-fix-the-mess/>.

[54] Investigation cessation order.

PROSECUTION

As mentioned, once the police or civil servant investigators have completed their investigations, they hand over the case, including the dossier of evidence (*berkas*), to prosecutors. Prosecutors then have seven days to determine whether to return it for further investigation, along with instructions to investigators (Articles 110(2), 137(1), and 138 of the KUHAP). If returned, investigators then have fourteen days to complete the investigation, following these instructions, and return the dossier to prosecutors. It is common for the dossier to be sent back and forth in this way and, in some cases, police choose to drop the returned case rather than investigate further.[55]

A prosecutor can decide not to proceed to prosecution if insufficient evidence exists, the alleged offence does not constitute a criminal act, or the case is closed by law (*ditutup demi hukum*) (Article 140(2a))—that is, it cannot legally proceed, for example, because the accused has died. If the prosecution chooses this course, it must issue a statement (*surat penghentian penuntutan*) explaining why prosecution was terminated. This decision is not final: 'the public prosecutor can prosecute the accused if later it is clear that a new reason exists [to do so]' (Article 140(d)).

Prosecutors can terminate a case or refuse to prosecute in the public interest—even if sufficient prima facie evidence exists that would otherwise enable prosecution. Law 16 of 2004 on Public Prosecution allows the prosecutor general (*Jaksa Agung*, also known as the attorney general) to 'put aside' a case if the 'public interest' so requires (Article 35(c)). 'Public interest' is vaguely defined as 'the interest of the nation and state and/or the wider community' (elucidation to Article 35(c)). Only the prosecutor general has this power and he or she must first consider the opinions of state institutions with authority over the issues involved in the case.

Once satisfied with the dossier, the prosecutor prepares a formal indictment and delivers it to the relevant district court, which will set a date for trial (Articles 140(1) and 152). At this stage, the case file usually contains:

(a) the arrest warrant;
(b) the detention order;
(c) the provision under which the suspect is charged;
(d) a crime scene report;
(e) a list of exhibits for trial;
(f) the names of witnesses interviewed and a summary of their records of interview (*berita acara pemeriksaan*);
(g) a legal analysis; and
(h) a conclusion.

Prosecutors can revise the indictment to refine or flesh out the indictment, or to terminate prosecution but only once, and not within the seven days before the trial commences. The suspect, his or her legal counsel, and the investigator must be informed of any amendments (Article 144).

Limitations on prosecution

Limitation periods

Articles 78–80 of the Criminal Code (KUHP) set time periods, after which defendants cannot be prosecuted. For crimes carrying a prison sentence of three years or less, the limitation period (*kedaluwarsa*) is six years. For crimes carrying a prison sentence of more than

[55] Strang (n 31) 198.

three years, the period is twelve years. For crimes carrying the death penalty or life imprisonment, it is eighteen years. For people under the age of eighteen years when the offence was committed, the period is reduced by one-third (Article 78). Limitation periods run from the day after the offence was committed (except in several specified circumstances) and cease upon prosecution (Articles 79–80).

Double jeopardy and reconsideration

The KUHP protects against double jeopardy (*nebis in idem*). Article 76 states:

> Except where it still possible for a judge's decision to be reconsidered, a person may not be prosecuted twice for an act about which an Indonesian judge has already adjudicated, in a decision that has become binding.

This 'double jeopardy' prohibition is repeated in Article 18(5) of the 1999 Human Rights Law:

> No person can be prosecuted for a second time for the same case for an act that has been the subject of a court decision that has legally binding force.

Thus, once an Indonesian judge has handed down a decision against the defendant that has acquired 'binding legal force'—that is, one against which no further appeal is possible[56]—the defendant cannot be prosecuted again for an act covered by that decision. The same prohibition applies where the defendant has already been prosecuted outside Indonesia.

The KUHAP, however, contains an important exception to the rule against double jeopardy: it specifically allows for judicial 'reconsideration' of a decision that has acquired binding legal force. This power is exercised by the Supreme Court and, although often described as a 'final appeal', it is better understood as the reopening of a case.[57] Using this power, the Supreme Court can reconsider almost all final and binding judgments of any Indonesian court, including its own cassation decisions and can, if necessary, re-decide them.

Reconsideration of a criminal case can occur only if:

- there is a new situation that gives rise to a strong suspicion that had that situation been known when the case was being heard, the result would have been an acquittal or dismissal of all charges, or the charges laid by the general prosecutor would not be accepted, or a lighter punishment would have been imposed in the case;[58]
- in several cases, something is proven but it appears that the proven issues or situations forming the basis and reason for the decisions conflict with each other; or
- the decision clearly shows a judicial error or an obvious mistake (Article 263).

Two aspects of reconsideration that relate to double jeopardy have proved controversial in recent years. The first is whether the prosecution can apply for reconsideration if a defendant has not been found guilty. The second is whether more than one reconsideration can be sought in the same case.

Can the prosecution apply for reconsideration of an acquittal?

On its face, the KUHAP does not authorize prosecutors to seek reconsideration, let alone in respect of an acquittal or dismissal:

> As regards a court decision that has obtained binding legal force, except for an acquittal or dismissal, a convicted person or his or her heir may bring a request for reconsideration to the Supreme Court (Article 263(1)).

[56] For further discussion of this concept, see Chapter 4.
[57] Simon Butt and Tim Lindsey, *The Indonesian Constitution: A Contextual Analysis* (Hart 2012) 89.
[58] Such a new situation is known in Indonesian law as a *novum*.

This reflects the fact that reconsideration was originally intended as an avenue for defendants who had been wrongly convicted but either had not appealed, or had exhausted all available avenues of appeal.[59]

Despite the clear words of Article 263(1), the Supreme Court, in a series of high-profile decisions since 1996,[60] allowed prosecutors to apply to reopen some acquittals and dismissals, but not others. To justify this, the Court relied on Article 263(3) of the KUHAP, which provides:

> As regards a court decision that has obtained binding legal force, a request for reconsideration may be brought ... if in that decision an act as charged was declared proved but was not followed by a punishment.

The Court argued that Article 263(3) must be intended for use by prosecutors, because only they would have an interest in changing such a decision. Convicts or their heirs, on the other hand, would not avail themselves of Article 263(3), because they would never want a decision to be changed to impose a punishment. According to this argument, Article 263(3) would be redundant unless it authorized a request for reconsideration by someone—and this must be prosecutors.

This ignores the possibility that a defendant found to have committed acts but who has received no punishment for them might still wish to seek a reconsideration of that decision to challenge the finding that he or she had committed those acts. This could be for reasons of reputation or because such acts might form the basis of other legal action against him or her, whether criminal or civil. On this view, Article 263(3) is necessary because Article 263(1) only applies where a person has been convicted. A conviction is not required for Article 263(3) to apply, because it is only relevant where no punishment has been imposed. Article 263(3) of the Criminal Code does not, therefore, empower the prosecution to apply for reconsideration. The Supreme Court followed this interpretation in another, smaller, group of decisions from 2007.[61]

When the Supreme Court has allowed reconsideration applications by prosecutors, it has usually also cited Article 24(1) of Law 48 of 2009 on Judicial Power:

> Concerning a court decision that has acquired binding legal force, parties involved may bring a reconsideration to the Supreme Court, whenever there is particular matter or situation as provided for in statute.

In these cases, the Court interpreted the phrase 'parties involved' broadly to cover prosecutors. This, however, ignores the fact that Article 24(1) is expressed to apply only where the matter or situation is 'provided for in statute'. This includes, of course, Article 263 of the KUHAP, which makes no reference to prosecutors or 'parties involved'.[62]

[59] The reconsideration process in the KUHAP is a revised version of earlier colonial mechanisms, which did allow application for reconsideration by the prosecution. The new process was specifically inserted into the Code to assist defendants who had suffered injustice: see Martiman Prodjohamidjojo, *Komentar atas Kitab Undang-Undang Hukum Acara Pidana (KUHAP)* (Pradnya Paramita 1984). This amendment was a response to a notorious case of injustice involving two men (Sengkon and Karta) who had exhausted their appeals and could not secure release despite another man having confessed to the murder for which they were imprisoned: Bekasi District Court Decision 2/K.T.S/Bks/1977, 20 October 1977; Bandung High Court Decision 38/1978/Pid/PTB, 25 May 1978; Supreme Court Reconsideration 6/PK/Kr/1980, 31 January 1981.

[60] These decisions include: Supreme Court Decisions 55/PK/Pid/1996, 25 October 1996, pp 362–66; 3/PK/Pid/2001, 2 August 2001; 54PK/Pid/2006; 15/PK/Pid/2006, 19 June 2006, pp 5–14; 109/PK/Pid/2007, 25 January 2008, pp 17–26; 8/PK/Pid/2008, p 13; 12/PK/Pid.Sus/2009, 11 June 2009, p 126); 07/PK/Pid.sus/2009, 8 June 2009, pp 41–50; and 41/PK/Pid/2009, 13 October 2009, pp 24–25.

[61] This alternative line of Supreme Court authority includes: 84/PK/Pid/2006, 18 July 2007, pp 7–8; 69/PK/Pid.Sus/2010; 152/PK/Pid/2010, 7 October 2010, pp 64–66; and 16/PK/Pid/2010, 29 November 2011, pp 23–24.

[62] This is reinforced by Art 76, Law 14 of 1985 on the Supreme Court, which identifies the KUHAP as the key reference point for reconsideration in criminal cases: 'In deciding an application for a *peninjauan kembali* of a criminal case that has binding legal force, the procedure for *peninjauan kembali* as provided for in the Code of Criminal Procedure shall be used.'

In these cases, the Court has also often referred to one of its own internal regulations, introduced to 'clarify' Article 263. This allows reconsideration applications from 'the prosecutor, the defendant or an involved party'.[63] Pulling itself up by its own bootstraps, the Court argues that granting this power to prosecutors would be largely meaningless if prosecutors could not seek to reopen acquittals.

In summary, although the reasoning used by the Supreme Court in decisions allowing prosecutors to seek reconsideration was neither consistent nor coherent, more decisions followed this line of authority than the contrary, and more convincing, view it expressed in a smaller number of decisions.

In May 2016, the Constitutional Court, in Decision 33/PUU-XIV/2016, sought to finally resolve the controversy over whether a prosecutor could bring a PK.[64] Confirming a previous decision,[65] it ruled that Article 263(1) was constitutional only if understood to mean that a request for reconsideration can be made by the convicted person or his or her heir but not by a prosecutor. Interpretations different to this, it held, cause legal uncertainty and are unconstitutional. This seems to have been a definitive resolution of the controversy but Prasetyo, the then Chief Prosecutor (*Jaksa Agung*), took a different view. The prosecution, he said, would continue to submit reconsideration requests because there is *yurisprudensi* (jurisprudence, leading decisions of the Supreme Court) that allows it. The Supreme Court responded by stating that the 2016 Constitutional Court decision is 'strict' and, because the Constitutional Court has more authority than the Chief Prosecutor, it will no longer accept PK requests from the prosecution.[66]

Unfortunately, the Supreme Court Spokesman, Suhadi, has since muddied the waters by saying it is up the panel of judges in each case to decide how to apply the Constitutional Court decision.[67] Prasetyo has also requested that the national legislature, the People's Representative Assembly (*Dewan Perwakilan Rakyat*, DPR), overrule the Constitutional Court by including a provision giving the prosecution the explicit right to submit a PK in respect of an acquittal or dismissal in any future amended version of the KUHAP.[68]

Is more than one reconsideration application allowed?

Article 268(3) of the KUHAP originally stated that only one reconsideration could be sought in each case. However, this provision was successfully challenged in the Constitutional Court in 2014. The Court decided reconsideration applications should be unlimited to prevent injustice to defendants who discovered evidence to support their claim after an application was refused.[69] The Constitutional Court held that allowing only one application violated constitutional principles of substantive justice and the rule of law, and citizens' rights.

The Supreme Court continued, however, to reject second reconsideration applications.[70] One motivation for this was preventing an anticipated flood of new reconsideration

[63] Art 10, Supreme Court Regulation 1 of 1980 on Reconsiderations.

[64] Constitutional Court Decision 33/PUU-XIV/2016.

[65] Constitutional Court Decision 16/PUU-VI/2008. See also Agus Sahbani, 'Akhirnya …MK Larang Ajukan PK' *Hukumonline* (12 May 2016) <http://www.hukumonline.com/berita/baca/lt5734711a1fc21/akhirnya-mk-larang-jaksa-ajukan-pk>.

[66] *Hukumonline*, 'MA: Larangan Jaksa Ajukan PK Mingikat Kejaksaan' *Hukumonline* (22 May 2016) <http://www.hukumonline.com/berita/baca/lt57412b95477b5/ma--larangan-jaksa-ajukan-pk-mengikat-kejaksaan>; Rakhmat Nur Hakim, 'Jaksa Agung: Meski MK Nyatakan Kami Tetap Ajukan PK' *Kompas* (6 June 2016) <http://nasional.kompas.com/read/2016/06/06/19043121/jaksa.agung.meski.mk.nyatakan.tak.bisa.kami.tetap.ajukan.pk>.

[67] Kompas, 'MA Diminta Terbitkan Fatwa tentang PK Jaksa' *Kompas* (4 March 2017).

[68] Indah Mutiara Kami 'Dilarang MK Ajukan PK, Jaksa Agung: Kami Akan Tetap Ajukan' *detikNews* (6 June 2016) <https://news.detik.com/berita/3226703/dilarang-mk-ajukan-pk-jaksa-agung-kami-akan-tetap-ajukan>.

[69] Constitutional Court Decision 34/PUU-XI/2013.

[70] Art 66, Law 14 of 1985 on the Supreme Court (amended by Law 5 of 2004 and Law 3 of 2009) and Art 24(2), Law 48 of 2009 on Judicial Power.

applications that might swamp the Court. It therefore published a practice note in December 2014, restating its position that reconsideration requests could still only be filed once.[71] The circular letter acknowledged that the Constitutional Court had revoked Article 268(3) but specified other statutes that allowed the Supreme Court to restrict the number of reconsideration requests to a single application, namely: Article 66 of Law 14 of 1985 on the Supreme Court (amended by Law 5 of 2004 and Law 3 of 2009); and Article 24(2) of Law 48 of 2009 on Judicial Power. However, the Constitutional Court intervened again, holding in 2016 and 2017[72] that because the substance of these two provisions were the same as Article 268(3), they no longer had binding legal power as far as they related to criminal cases.[73]

This seems to have ended argument on the issue and the Supreme Court now accepts second PK requests.[74]

[71] Supreme Court Circular Letter 7 of 2014.

[72] Decisions 108/PUU-XIV/2016; 1/PUU-XV/2017; and 23/PUU-XV/2017.

[73] The Court added that in civil cases, multiple PK requests would cause prolonged resolution of cases and result in legal uncertainty and would therefore not be permitted.

[74] See the Supreme Court Registry website for details: *Kepaniteraan Mahkamah Agung RI* <https://kepaniteraan.mahkamahagung.go.id/index.php/kegiatan/1410-inilah-putusan-yang-diajukan-peninjauan-kembali-di-tahun-2016>.

12

Criminal Procedure

Trials and Appeals

INTRODUCTION

As mentioned in Chapter 11, Indonesia's Code of Criminal Procedure (*Kitab Undang-undang Hukum Acara Pidana*, KUHAP: Law 8 of 1981) is the primary law dealing with criminal procedure. The previous chapter outlined early stages of criminal processes, including investigations and prosecutions. This chapter focuses on trials, sentencing, appeals, clemency, remissions, parole, and extradition. Many of these are only sparsely covered in the KUHAP. Finally, we demonstrate how these provisions and processes can work in practice, using the case of a convicted drug smuggler, Schapelle Corby, as an illustration.

TRIAL PROCEDURE

Chapter XVI of KUHAP covers trial procedure. As the Indonesian legal system is a civil law system, nearly all district court (*pengadilan negeri*) cases are heard by a panel of three judges and juries are not used. One of the judges is the chair (*hakim ketua*) and is usually more senior than the other two. Typically, the judges produce a single, joint judgment (*putusan*), though dissenting opinions are permitted. Civil law systems are 'inquisitorial', meaning the judges inquire into the truth of what has occurred. The judges control the proceedings and can directly question witnesses if they choose.

The KUHAP recognizes three types of trials: ordinary examinations (*acara pemeriksaan biasa*); summary examinations (*acara pemeriksaan singkat*); and expedited examinations (*acara pemeriksaan cepat*). Expedited cases involve crimes that attract up to three months' detention (*kurungan*) or a Rp 7,500 fine; and minor insult or slander (*penghinaan ringan*) (Article 205(1)). Expedited cases are heard by a single judge and decided on a single day, cannot be appealed, and must commence within three days of filing (Articles 205(3) and 207(1)(b)). Witnesses can be called but need not be under oath (Article 208). Summary examination, meanwhile, is used for simple crimes not mentioned in Article 205 to which the application of the law is straightforward, and which the public prosecutor considers will be easily proved (Article 203(1)). The public prosecutor presents the accused, plus any witnesses, experts, interpreters, and evidence required (Article 203(2)). If the judge believes further investigation is required, the judge can provide prosecutors with up to fourteen additional days to investigate the case. If prosecutors fail to complete their investigation within this period, the judge can then order that the case be heard as an 'ordinary examination' (Article 203(3)).

Ordinary examinations, or *acara pemeriksaan biasa*, proceed as follows. When the district court head receives a case file from prosecutors, he or she first determines whether the case appears to fall within the court's jurisdiction. If it does, then he or she selects the judges to hear the case, who then determine the date for the trial (Article 152(1)). Judges, prosecutors, or clerks must recuse themselves if they have a blood or marital relation to the third degree, or are, or were, married to the defendant or his or her legal representative (Article 157).

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Presiding judges are expected to have read the case file before the case commences. Much anecdotal evidence suggests, however, that judges routinely fail to do this and are, therefore, ill-prepared to handle and decide their cases.

The language of the trial is Indonesian and the chair (*ketua*) of the panel of judges must ensure that the defendant and witnesses can answer questions freely. Trials must be open and public, unless issues of morality or juvenile offenders are involved. Failure to meet these conditions renders any decision reached invalid (*batal demi hukum*) (Article 153(1)–(4)).

When the trial commences, the chair must confirm the defendant's personal details and ask whether he or she completely understands the charges (Article 155). The defendant or his or her legal representative can object to the court's jurisdiction or the indictment. After hearing from the public prosecutor, the judges decide this matter. If the court agrees with the defendant, the case proceeds no further (Article 156(1)–(2)).

Judges must hear testimony from all witnesses named in the case file, beginning with any victim statements. All witnesses must recite an oath or swear according to their religion that they will provide a truthful recollection of events (Article 160). If testimony by a witness differs from his or her statement recorded in the case file, the chair must remind the witness of the obligation to be truthful and ask for an explanation for the discrepancy (Article 163). Penalties apply for providing a false statement (Article 174).

Judges, prosecutors, and the defendant or his or her legal counsel can question witnesses (Article 165). Questions that may 'ensnare' the witness or defendant are not permitted (Article 166). People who must safeguard secrets because of their occupation, position, or the esteem in which they are held, may ask to be excused from providing witness testimony. This includes officials with obligations to maintain the confidentiality of state secrets. Judges decide on the soundness of the reasons offered (Article 170(1)–(2)). All relevant evidence must be shown to the defendant (and witnesses, if necessary). The head judge is also required to show all pieces of evidence to the accused (and any witnesses, if necessary) for comment (Article 181(1)–(2)).

Following witness examination, the prosecutor proposes a sentencing demand, and the defendant has an opportunity to defend him or herself. The prosecutor can respond to this defence, although the defendant always has the opportunity to speak last. The sentencing demand, defence, and response to the defence are provided in writing, read out in court, and submitted to the chair (Article 182(1)). The chair then declares that the examination has concluded, although it can be reopened if requested by the prosecutor or accused (Article 182(2)).

The judges then deliberate, with the chair asking the opinions of the other judges on the panel, from youngest to oldest, to reach a decision. While a unanimous decision is ideal, a majority of the panel carries the day. If there is no majority, then the decision most favourable to the defendant is adopted (Article 182(5)–(6)). Given that panels comprise an odd number, this rule appears applicable only if one judge suffers misfortune during the trial such that they cannot participate in deliberations.

Presumption of innocence

As noted in the previous chapter, the KUHAP contains no clear, comprehensive articulation of a defendant's fundamental rights or the principles that underpin many criminal justice systems, such as the right to remain silent or the presumption of innocence. However, defendants have the right to be presumed innocent until proved guilty. Article 8(1) of Law 48 of 2009 on Judicial Power states that every person suspected, arrested, detained, prosecuted, or summoned before the courts must be considered not guilty until a judicial decision of binding legal authority establishes guilt.

The KUHAP, meanwhile, places the burden of proof to establish guilt on prosecutors (Article 66). That onus is, however, reversed in rare instances. This is true, for example, for defendants charged under Article 98 of the Law 35 of 2009 on Narcotics, who are responsible for demonstrating that certain assets are not proceeds of drug-related crime.

Law 39 of 1999 on Human Rights also provides for defendants' rights. For example, Article 18, which implements Article 14(2) of the International Covenant on Civil and Political Rights, provides the presumption of innocence to all persons arrested, detained, or prosecuted on suspicion of committing a crime, until otherwise proven guilty in court.[1]

Evidence and witnesses

Judges cannot convict a defendant unless they have the strong belief (*memperoleh keyakinan*) that a crime has taken place and that the accused committed it. This strong belief must be supported by at least two 'valid pieces of evidence' (*alat bukti yang sah*) (Article 183 of the KUHAP).

Article 184 of the KUHAP identifies five types of legally admissible evidence:

- witness testimony;
- expert evidence;
- documents/letters;
- indications (*petunjuk*); and
- testimony of the suspect/accused.

A witness is someone who provides a statement for an investigation, prosecution, or trial about what he or she heard, saw, or experienced first hand (Article 1(26)). However, the testimony of only one witness will not suffice; at least two are required (Article 185(2)), or one witness' testimony must be supported by another piece of valid evidence (Article 185(3)). A defendant's statement is admissible if made before the court, but must be supported by at least one other form of evidence (Article 189(2)).

Using documentary evidence is restricted under Article 184(1)(c). This provision limits documents with *alat bukti* status to 'official documents' produced by 'public officials' about events or circumstances they heard, saw, or experienced, including records of interview (Article 187(a)); documents containing expert opinions (Article 187(b)), including affidavits; and 'other documents', provided they 'have a connection with the substance of another piece of evidence' (Article 187(c)).

Petunjuk, broadly translatable as 'circumstantial' evidence, is notoriously difficult to describe and apply.[2] The formal definition of *petunjuk* evidence encompasses:

> acts, events or circumstances which, because they are consistent with each other, or with the crime itself, indicate that a crime has been committed and the identity of the perpetrator (Article 188(1)).

This will usually be indirect evidence, relied upon when direct evidence—such as eye witness testimony—is lacking. Like other forms of evidence, use of *petunjuk* evidence is limited by the KUHAP. For example, like witness testimony, a sole piece of *petunjuk* evidence will be insufficient. It must be corroborated by at least one other form of *petunjuk* evidence or another type of valid evidence before it can formally be considered valid evidence.

[1] See also Constitution Court Decision 133/PVV-VII/2009, para [4.3], where the court held that the presumption of innocence is implicit in the constitutional statement that the rule of law (*negara hukum*) applies in Indonesia.

[2] Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHP: Pemeriksaan Siding Pengadilan, Banding, Kasasi dan Peninjauan Kembali* (2nd edn, Sinar Grafika 2000).

Conspicuous in their absence from Article 184 are types of evidence relied upon in many trials around the world, such as photographs, telephone recordings, videos, electronic transmissions, and the like. This means that incontrovertible evidence, such as a reliable video footage showing the accused committing a crime, even if corroborated by one type of evidence acknowledged in Article 184, might not be sufficient to ensure conviction. In practice, their admissibility—primarily as *petunjuk* evidence—depends on the inclinations of the presiding judges. We note that many of the special criminal laws, outlined in Chapter 10, include provisions that allow more 'modern' forms of evidence—that is, types of evidence not covered in Article 184 of the KUHAP—to be formally considered valid evidence and thus among the two pieces of evidence needed to establish guilt.

Article 185 specifies how judges should weigh up evidence. They must assess: agreement or consistency between witness statements, and other types of evidence; the motive a witness may have to provide a particular explanation; the lifestyle and morality of a witness; and all other matters that could influence the plausibility of the testimony.

In 2011, the Constitutional Court expanded the definition of 'witness' to include people beyond those who 'heard, saw or experienced' the crime, as defined in Article 1(26). The applicant, former Law and Human Rights Minister Yusril Ihza Mahendra, who was facing corruption charges,[3] objected to the narrow definition of 'witness'. He had wanted to call Vice-President Jusuf Kalla, and former Presidents Megawati Soekarnoputri and Susilo Bambang Yudhoyono as witnesses for the defence under Article 65 of the KUHAP, but prosecutors had refused because these people did not directly experience the crime. The Court held that the definition of 'witnesses' did not need to be confined to the Article 1(26) categories. The precise implications of this decision are not clear but it seems possible that defendants can now call witnesses to provide an alibi or attest to their good character. Nevertheless, well-founded concerns have been raised about the willingness of investigators and prosecutors to implement this decision.[4]

APPEALS

Both defendant and prosecution can appeal a decision, unless it arose from an expedited procedure. As explained below, the Constitutional Court has ruled that prosecutors can appeal acquittals.

Appeals (*banding*) from first instance district courts are heard in the high court (*pengadilan tinggi*) located in the capital of each province (Article 87). Appeals must be lodged at the district court where the case was first heard within seven days of the first instance decision (Article 233).[5] If the defendant does not do this, then he or she is deemed to have accepted the decision (Article 234(1)) and it becomes enforceable. This time limit is usually strictly applied, and the courts routinely reject late applications, regardless of the reason.

A panel of at least three high court judges review each appeal. There are usually no hearings and no opportunity for verbal submissions, with the panel relying exclusively on the appeal documents (Article 238(1)). If the high court believes that district court negligently applied the law, made a mistake, or was not complete in its examination, the high court can remit the case to the same district court with an order to correct, or can make the correction itself (Article 240(1)). If necessary, the high court can vacate a district court decision before issuing its own (Article 240(2)).

[3] Constitutional Court Decision 65/PUU-VIII/2010.

[4] 'Advokat Ragu Penyidik Patuhi Putusan MK' *Hukumonline* (August 2011) <http://www.hukumonline.com/berita/baca/lt4e54f084b1ed5/advokat-ragu-penyidik-patuhi-putusan-mk>.

[5] Art 236 states that the district court clerk must send a copy of the decision, the case file, and evidence to the high court within fourteen days of the appeal being lodged.

If dissatisfied with the high court decision, parties can apply for cassation (*kasasi*) by the Supreme Court (*Mahkamah Agung*). They have fourteen days from the date of the high court decision, or from being informed of that decision (Articles 244 and 245(1)),[6] after which the application will usually be rejected, regardless of the merits, and the high court decision becomes enforceable. In addition, prosecutors can apply for 'cassation in the interests of law' (*kasasi demi kepentingan hukum*). This is effectively an appeal against a district or high court decision and can only be used once in a particular case (Article 259). Any penalty imposed by the Supreme Court in such a cassation cannot exceed that imposed at the initial trial.[7]

In a cassation, the Supreme Court can overturn decisions of lower courts if, for example, they lacked, or exceeded their, jurisdiction; or wrongly applied the law or broke it (Article 253(1)). Formally, the purpose of cassation is to ensure correct application of the law, but in practice, the Supreme Court generally treats it as an 'appeal' and can find ways to reconsider matters of fact if it wishes to, usually by characterizing factual matters as involving problems of law.[8] In practice, however, the Supreme Court's approach to cassation is inconsistent, sometimes being open to reviewing the facts and sometimes insisting strictly on only considering legal issues

A cassation decision has permanent binding force, and is immediately executable, although problems with enforcement are very common, as discussed in Chapter 4.[9]

Appeals against acquittals

The KUHAP appears to prohibit the Supreme Court from hearing cassations against acquittals. Article 244 states:

> the accused or prosecutor may file a cassation appeal at the Supreme Court for all judgments on criminal cases handed down by a court other than the Supreme Court, *except for acquittals*.[10]

However, the Court regularly hears such cassations.[11] To justify this, it used to cite the jurisprudence (*yurisprudensi*, or influential Supreme Court decisions) established by Supreme Court Decision 275/K/Pid/1983, which the Court decided overrode Article 244. The Court typically differentiated between 'pure acquittals' (*bebas murni*)—loosely, an acquittal on the merits—and 'qualified acquittals' (*bebas tidak murni*), which covered other forms of acquittals, for example, an acquittal because of a procedural error. The Supreme Court would usually reject cassation appeals on *bebas murni* acquittals, for example, when the offence with which the accused was charged was not supported by sufficient evidence. By contrast, an acquittal decision might be considered *tidak murni* if it were based on incorrect application of an offence in the indictment.[12] This is a very technical distinction that caused much confusion in legal circles and even among judges. Many commentators suspected that it was in fact a fictional distinction that allowed the Court to hear appeals against any acquittal at its own discretion.

In 2013, the Constitutional Court changed this. It heard a challenge to Article 244 submitted by a former civil servant from West Sumatra, who had been acquitted by the Padang corruption court. The applicant argued that Article 244 did not provide a sufficiently clear prohibition

[6] Arts 244, 245(1), KUHAP.

[7] Art 259(2), KUHAP. See also Agustinus Edy Kristianto, A Patra M Zen, and Carolina S Martha, *Panduan Bantuan Hukum di Indonesia: Pedoman Anda Memahami dan Menyelesaikan Masalah Hukum* (YLBH: PSHK 2009) 340.

[8] Simon Butt and Tim Lindsey, *The Indonesian Constitution: A Contextual Analysis* (Hart 2012) 87.

[9] ibid.

[10] Emphasis added. See 'MA Protes Larangan Kasasi Vonis Bebas' *Hukumonline* (12 July 2012) <http://www.hukumonline.com/berita/baca/lt4ffe97b185446/ma-protes-larangan-kasasi-vonis-bebas>.

[11] See, for example, Supreme Court Decision 1521K/PID/2002.

[12] See Supreme Court Decision B-201/f/Fpt/5/1990.

against prosecutors filing a cassation appeal against his acquittal, and as a result, his constitutional right to legal certainty was violated.[13] The Constitutional Court granted the application but instead of clarifying that acquittals could not be appealed it removed the phrase 'except for acquittals' from Article 244—a result far from what the applicant sought.

Following this decision, the Supreme Court changed the format of cassation applications, no longer differentiating between *bebas murni* and *bebas tidak murni* acquittals. *All* acquittals can now be appealed.[14]

Reconsideration

Although not strictly an appeal, the KUHAP also provides another avenue that strongly resembles an appeal, including of a cassation decision. This is reconsideration (*peninjauan kembali*—PK), discussed in the previous chapter in the context of double jeopardy.

Reconsideration enables the Supreme Court to reopen a decision of any court (other than the Constitutional Court) that is of 'binding legal force', including the Supreme Court's own cassation decisions (Article 263). Applications are lodged with the court that first handled the case and there is no time limit on when they may be lodged (Article 264(3)).

Briefly restated, the requirements for a reconsideration are the emergence of new determinative evidence or circumstances (commonly known as a *novum*); inconsistent lower court decisions; or judicial error (Article 263(2)). Applicants can often easily meet at least one of these. If the application is based on a *novum*, the case will usually be remitted temporarily to the district court that originally heard the matter. It will examine this new evidence, including hearing any witnesses, and then return the case to the Supreme Court, along with a summary of evidence taken. Formally, any penalty issued in a reconsideration decision must not exceed that of the original decision (Article 266(3)), although in practice this rule is often ignored.

As mentioned in the previous chapter, the Constitutional Court in 2013 removed the restrictions in Article 268(3) of the KUHAP that prevented a person lodging more than one reconsideration application,[15] but the Supreme Court circumvented this by relying on provisions in other laws that limit reconsiderations to just one,[16] which the Constitutional Court did not deal with in its decision. In 2016 and 2017,[17] however, the Constitutional Court held that because the substance of these laws were the same as Article 268(3), they were no longer binding as far as they related to criminal cases. The Supreme Court seems to have accepted this and has now heard a number of second PK applications.[18]

Compensation and rehabilitation

An individual has the right to compensation if arrested, detained, prosecuted, or sentenced wthout a valid legal reason, or if mistakes were made about the person's identity or the law applied (Article 1(22)). Individuals also have the right to 'restoration' of their previous position, dignity, and status.[19] Compensation and rehabilitation can be awarded in a pre-trial hearing, if the judge finds that an arrest or detention was illegal (Article 77(b)).

[13] 'Pelarangan Kasasi Atas Vonis Bebas Dibatalkan' *Hukumonline* (28 March 2013) <http://www.hukumonline.com/berita/baca/lt515443599911e/pelarangan-kasasi-atas-vonis-bebas-dibatalkan>.

[14] 'Bebas Murni Atau Tidak Murni Sudah Tak Relevan' *Hukumonline* (28 October 2013) <http://www.hukumonline.com/berita/baca/lt526dcda563378/bebas-murni-atau-tidak-murni-sudah-tak-relevan>.

[15] Constitutional Court Decision 34/PUU-XI/2013.

[16] Namely, Art 24(2), Law 48 of 2009 on Judicial Power and Art 66(1), Law 14 of 1985 on the Supreme Court, as amended by Law 5 of 2004.

[17] Constitutional Court Decisions 108/PUU-XIV/2016, 1/PUU-XV/2017, and 23/PUU-XV/2017.

[18] <https://kepaniteraan.mahkamahagung.go.id/index.php/kegiatan/1410-inilah-putusan-yang-diajukan-peninjauan-kembali-di-tahun-2016>.

[19] Chapter XII of the KUHAP specifies the procedures for rehabilitation and compensation in greater detail.

Government Regulation 92 of 2015[20] significantly changed the way compensation is calculated. Under its predecessor, individuals could demand between Rp 5,000 and Rp 1 million (US$0.35–74). The 2015 Regulation increases the range from Rp 500,000 to Rp 100 million (US$37–7,400). The 2015 Regulation also permits the award of Rp 25 million to Rp 300 million, if the actions of law enforcement officials result in serious injuries or disabilities that interfere with an individual's ability to work. Compensation increases to between Rp 50 million and Rp 600 million if illegal arrest, detention, prosecution, or trial, or mistaken identity or application of the law, results in death (Article 9). The 2015 Regulation requires the Ministry of Finance to pay within fourteen working days of receiving the compensation request (Article 11(2)).

OTHER MATTERS

Clemency

Article 14 of the Constitution grants various powers to the president to free prisoners or reduce their sentences. These include rehabilitation (*rehabilitasi*) of the reputation of a defendant accused of a crime but ultimately acquitted; amnesty (*amnesti*), where a class of prisoners are released from imprisonment; and abolition (*abolisi*), where a defendant is released while on trial. To issue amnesty and abolition, the president must consider the views of the national legislature (*Dewan Perwakilan Rakyat*, DPR).[21] An example of its use occurred in 2005, when President Yudhoyono granted amnesty and abolition to 1,424 members of the Free Aceh Movement (*Gerakan Aceh Merdeka*, GAM) as part of a political settlement with the separatist movement.[22]

The most commonly exercised of these presidential powers is clemency (*grasi*), under which the president can change, reduce, or quash a criminal punishment.[23] To exercise clemency, the president must consider the views (*memperhatikan pertimbangan*) of the Supreme Court.[24] The 2002 Law on Clemency, amended in 2010,[25] outlines the procedures and requirements for its application and grant. Clemency can be granted to people sentenced to death, life imprisonment, or imprisonment for at least two years. The Law does not make particular offences ineligible for clemency. The Law reiterates Article 14(1) of the Constitution, authorizing the president to either grant or reject a clemency application but only after considering the views of the Supreme Court. The president is not, however, bound by the Supreme Court's recommendations.

Clemency applications can be lodged after the judicial decision issuing the punishment becomes final and binding. Whether applications can be made more than a year after this date has been a fraught legal issue. The 2002 Clemency Law contained no limit but Article 7(2) of the 2010 amendment to the Law imposed a one year limit, apparently to prevent prisoners delaying their pending executions.[26] However, in 2016, the Constitutional Court held that this one-year limit was unconstitutional because it sought to limit the president's constitutional powers, which, the Court held, allowed him or her to grant clemency at any time.[27]

[20] Government Regulation 92 of 2015 on the Second Amendment of Government Regulation 27 of 1983 on the Implementation of the Criminal Procedure Code.

[21] Art 14(1), Constitution.

[22] International Crisis Group, *Aceh: Post-Conflict Complications* (International Crisis Group 2007) 9.

[23] Daniel Pascoe, 'Jokowi's Dilemma: Amnesty or Clemency for Political Prisoners' *Indonesia at Melbourne* (20 July 2015) <http://indonesiaatmelbourne.unimelb.edu.au/jokowis-dilemma-amnesty-or-clemency-for-political-prisoners>.

[24] Art 14(1), Constitution.

[25] Law 5 of 2010 on the Amendment of Law 22 of 2002 on Clemency.

[26] Daniel Pascoe, *Clemency in Southeast Asian Death Penalty Cases* (Centre for Indonesian Law, Islam and Society Policy Paper No 4; Asian Law Centre Briefing Paper No 1 2014) 15.

[27] Constitutional Court Decision 107/PUU-XIII/2015.

Clemency appeals can be lodged by convicted persons, their legal representatives, or their families (Article 8(1) of the 2002 Clemency Law). Copies of the application must be sent to the district court that first heard the case, which must then forward the application to the Supreme Court (Article 8(2)). The Supreme Court must forward a written opinion about the application to the president within thirty days (Article 10). The 2010 amendment also empowers the Minister for Law and Human Rights to 'facilitate' the submission of clemency applications, or call on the parties mentioned in Article 8(1) to submit, a clemency application 'in the interests of justice and humanity'. The minister can also further examine an application and advance the clemency process, including by submitting the application to the president (Article 6A(2)).

The Law requires the president to decide the clemency application within three months of receiving the Supreme Court's opinion (Article 11). However, this limit is routinely ignored. If the applicant has a pending judicial reconsideration (*peninjauan kembali*) application, the president must not decide the clemency application until the Supreme Court has issued its judgment.

The authority to grant or deny clemency is a presidential prerogative. The Law provides little guidance about what factors the president should or must consider, except for the Supreme Court's opinion. The General Elucidation to the 2010 Clemency Law Amendment merely states:

> in issuing a decision in relation to a clemency application, the president must wisely and judiciously consider matters in relation to the crime committed by the convicted, particularly in cases where the crime has been committed repeatedly, is a crime against morality and is sadistic or premeditated in nature.

The administrative courts have held that the president's clemency powers are broad and unreviewable. In April 2015, for example, the Jakarta Administrative Court held that it lacked jurisdiction to hear an appeal brought by narcotics convicts Andrew Chan and Myuran Sukumaran against President Joko Widodo's refusal to properly consider their clemency requests.[28] In their application, Chan and Sukumaran pointed to the fact that Widodo had publicly stated that he had not read their applications before rejecting them, as was widely reported in the media. However, their lawyers failed to convince the Court of its jurisdiction, unsuccessfully arguing that clemency was an administrative decision because the president, as head of the government, was an administrative official.[29]

Remissions

Prisoners can apply for conditional release or a sentence reduction (remission). The processes and requirements for this are governed by Law 12 of 1995 on Corrections and numerous executive regulations.[30] The 2012 Government Regulation on Inmates grants all prisoners the right to remissions,[31] with good behaviour and after serving six months of

[28] George Roberts, 'Bali Nine: Indonesian Court Rejects Andrew Chan, Myuran Sukumaran's Last-Ditch Appeal against Execution' *ABC News* (7 April 2015) <http://www.abc.net.au/news/2015-04-06/court-decides-on-bali-nine-pair-appeal-against-execution/6373032>.

[29] George Roberts, 'Bali Nine: Law Expert Says Indonesian Court Has Power to Hear Execution Challenge for Andrew Chan, Myuran Sukumaran' *ABC News* (30 March 2015) <http://www.abc.net.au/news/2015-03-30/expert-says-indonesian-court-can-hear-execution-challenge/6359910>.

[30] Presidential Decision 174 of 1999 on Remissions; Government Regulation 99 of 2012 on Changes to Government Regulation 32 of 1999 on Conditions and Requirements of Inmates Rights, as amended by Government Regulation 28 of 2006 and Government Regulation 99 of 2012; and Regulation of the Minister of Law and Human Rights 21 of 2013 on the Requirements and Procedure for Granting Remission, Assimilation, Family Leave, Conditional Release, Leave Approaching Release and Conditional Leave.

[31] Art 34, Government Regulation 99 of 2012 on the Amendment of Government Regulation 32 of 1999 on Conditions and Requirements on Inmates' Rights.

Table 12.1 Remissions

Sentence served	General remission (Article 4)	Special remissions (Article 5)
6–12 months	1 month	15 days
1 year	2 months	1 month
2 years	3 months	1 month
3 years	4 months	1 month
4–5 years	5 months	1 month and 15 days
6+ years	6 months	2 months

their sentence. Good behaviour means not incurring disciplinary action for six months and participating satisfactorily in rehabilitation programmes run by the corrections institution (Article 34(2)–(3)).

Inmates convicted of serious crimes—including terrorism, narcotics, corruption, crimes against national security, crimes against humanity, and international organized crime—must meet additional requirements, including providing a written statement indicating their willingness to cooperate with law enforcement officials, such as to provide further details about their case (Article 34A(1) and (3)).[32] Presumably this is intended to help police pursue others involved in that case. In narcotics cases, this cooperation requirement only applies to those serving a prison sentence of five years or more (Article 34A(2)). To be eligible for remission, inmates convicted of corruption must pay court-imposed fines or compensation. Terrorism convicts must join a deradicalization programme run by the correctional facility or the National Counterterrorism Agency; and swear allegiance to the Republic of Indonesia (for Indonesian citizens) or vow not to engage in terrorism again (for foreign nationals) (Article 34A(1)(b), (c)).[33]

Presidential Decision 174 of 1999 on Remissions provides further procedural details. The Minister of Law and Human Rights grants remissions on Independence Day (17 August) (Articles 1 and 2(a) of the Presidential Decision). 'Special' remissions are granted on religious holidays, such as *Idul Fitri* (*Eid al-Fitr*), and Christmas, depending on the inmate's religion (Article 2(b)). The length of remission granted depends on the type of remission, and the length of the sentence served, as Table 12.1 demonstrates.

Inmates can also receive 'additional' remissions if they demonstrate service to the country; or behave in a way that benefits the country, humanity, or rehabilitation activities in prison (Article 3(1)). These additional remissions are one-third of the length of the general remission period for behaviour assisting rehabilitation activities, and one-half for service to the country and the other types of behaviour (Article 6).

The head of each correctional institution applies to the Minister for these remissions. The Minister informs inmates of remission decisions each year on Independence Day and on the relevant religious holiday (Article 13).

Conditional release and leave

Prisoners may be eligible for conditional release (*pembebasan bersyarat*), or parole, before serving their full term (Articles 15, 15a, 15b, 16 of the Criminal Code (*Kitab Undang-undang*

[32] These requirements are also detailed in Arts 3 and 7, Regulation of the Minister of Law and Human Rights 21 of 2013 on the Requirements and Procedure for Granting Remission, Assimilation, Family Leave, Conditional Release, Leave Approaching Release, and Conditional Leave.

[33] Art 34A(1), Government Regulation 99 of 2012 on the Amendment of Government Regulation 32 of 1999 on Conditions and Requirements on Inmates' Rights.

Hukum Pidana, or KUHP). Again, the Minister for Law and Human Rights is responsible for conditional release (Article 16 of the KUHP). In 2009, the Ministry's Directorate General of Corrections introduced a pilot programme to reduce overcrowding in prisons, by relaxing the requirements for parole and sentence reductions. The programme was short-lived, however, because of a public backlash, particularly against the early release of prisoners convicted of corruption and terrorism.[34]

Minister of Law and Human Rights Regulation 21 of 2013[35] establishes the following types or stages of conditional release.

- Assimilation: This reintroduces inmates to community life (Article 1(2)). Inmates must be at least halfway through their sentence, have demonstrated good behaviour,[36] and actively participated in rehabilitation programmes (Article 21(1)). Assimilation can involve education, work skills training, community work, or other activities (Article 30). Inmates convicted of terrorism, narcotics, corruption, crimes against state security, gross violations of human rights, or organized transnational crime must have completed at least two-thirds of their sentences to be eligible (Article 22), and are restricted to community work in government or non-governmental institutions, including in religious organizations, and sectors such as agriculture, education, culture, health, and sanitation (Article 34).
- Family leave: This rehabilitation programme allows inmates to assimilate with their families and the community (Article 1(3)), for a maximum of two twenty-four-hour periods every three months (Article 44). Family leave is available to inmates serving a sentence of at least twelve months (Article 35(b)). Again, inmates must demonstrate good behaviour, and must not have violated prison procedures in the past year (Article 35(a)). They should have served at least half of their sentence, or six months in the case of child detainees (Article 35(c) and (e)). Ineligible are: narcotics offenders serving five years or more; people convicted of terrorism, corruption, crimes against state security, gross violations of human rights, or organized transnational crime; inmates sentenced to death or life in prison; inmates whose lives are under threat; and inmates who might reoffend (Article 36).
- Conditional leave: This is another rehabilitation programme to help with reintegration (Article 1(4)). Conditional leave can be granted for a maximum of four months (Articles 69 and 71). To be eligible, inmates must be serving sentences of fifteen months or less, have served at least two-thirds of that sentence, and have demonstrated good behaviour for the past six months (Article 68). Inmates convicted of terrorism, narcotics, corruption, crimes against state security, gross violations of human rights, or organized transnational crime must show nine months' good behaviour. If the offender commits another offence while on leave, the time spent on leave does not count towards the original sentence.[37]
- Leave approaching release: This rehabilitation programme seeks to reintegrate inmates into community life, after they have fulfilled certain requirements (Article 1(4)). The inmate must have served two-thirds of his or her sentence, with at least nine months of good behaviour. The length of the leave is the same as the last remission

[34] Leopold Sudaryono, 'Overcrowding Crisis' *Inside Indonesia* 113 (September 2013) <http://www.insideindonesia.org/overcrowding-crisis>.

[35] Regulation of the Minister of Law and Human Rights 21 of 2013 on the Requirements and Procedure for Granting Remission, Assimilation, Family Leave, Conditional Release, Leave Approaching Release, and Conditional Leave.

[36] To be considered for 'good behaviour' the inmate must not have been subject to disciplinary action in the previous six months (Art 21(3)).

[37] Art 6(1)(f)(4), Minister of Law and Human Rights Regulation M.2.PK.04-10 of 2007.

granted, and can be no longer than six months (Article 60). For inmates convicted of terrorism, narcotics, corruption, crimes against state security, gross violations of human rights, or organized transnational crime, leave cannot exceed three months and must be approved by the director general of corrections (Article 61).

- Conditional release:[38] Again, the purpose of this rehabilitation programme is reintegrating inmates into community life. To be eligible, inmates must have served two-thirds of their sentence, or at least nine months, whichever is greater (Article 49). The inmate must have demonstrated good behaviour in the previous nine months and have participated in rehabilitation activities with enthusiasm and diligence. The community must also 'be able to accept' the inmate (Article 49(1)). Conditions may be imposed during their release, including continuing good behaviour.[39] The requirements vary for inmates convicted of terrorism, narcotics, corruption, crimes against state security, gross violations of human rights, or organized transnational crime (Articles 51–54).

The procedure for granting leave and conditional release has been simplified since the introduction of an electronic database across the Indonesian corrections system, although multiple layers of approval are required. A corrections observation team examines the inmate's record and makes a recommendation to the head of the corrections institution housing the inmate. Final approval is at the discretion of the head of the corrections institution or the Minister (who might first seek advice from law enforcement institutions, such as police, prosecutors, and BNN), depending on the type of crime.[40]

Conditional release may be revoked if the inmate breaks the law; 'causes unrest in the community' (*menimbulkan keresahan dalam masyarakat*); or fails to: inform officials about any change of address; participate in mandatory development programmes; or report to prison officials on three consecutive occasions (Articles 83–86).

Life imprisonment

Does a life sentence in Indonesia means the prisoner must die in jail? The answer is: not necessarily. This is because life imprisonment can be reduced by clemency (*grasi*) or remission (*remisi*), the procedures for which are regulated by different instruments, described above.

The 2002 Clemency Law permits a person who receives a life sentence to seek a sentence amendment in a clemency application (Articles 2 and 4(2)). Remission for those sentenced to life imprisonment is regulated by Presidential Decision 174 of 1999 on Remissions.[41] Article 9 provides:

(1) Inmates subjected to a life sentence who have served at least five years, and have demonstrated good behaviour, can have their sentence change to a fixed period of time, with 15 years the maximum time remaining to be served.

(2) A change from life imprisonment to a fixed sentence as stipulated in paragraph (1) is granted by Presidential Decision.

(3) A request to change life imprisonment to a fixed sentence shall be submitted by the inmate to the President via the Minister of Law and Legislation [now the Minister of Law and Human Rights].

[38] The KUHP also contains provisions about conditional release, many of which are reflected in this regulation. See Arts 15–16. To qualify, a prisoner must have served at least nine months, or two-thirds of their sentence, whichever is greater (Art 15(1)). To determine this minimum period, multiple prison sentences are counted as one term (Art 15(1)). The parole period is one year longer than the remainder of the sentence (Art 15(3)).

[39] See generally Arts 15–16, KUHP.

[40] See Arts 25–29, 39–44, 55–59, 63–67, and 73–77. Minister of Law and Human Rights Regulation 21 of 2013.

[41] The president's power to regulate remissions derives from Art 35 of Government Regulation 32 of 1999 on the Requirements and Procedures for implementing the Rights of Inmates.

(4) Procedures for submission of a request to change life imprisonment to a fixed sentence as stipulated in paragraph (3) will be further regulated by a Decision of the Minister of Law and Human Rights.

A prisoner whose life sentence has been reduced to up to fifteen years can then apply for further remissions, assimilation, and full release (Article 10).

Extradition

The underlying legal principles concerning extradition, both to and from Indonesia, are contained in Law 1 of 1979 on Extradition. However, most extraditions between Indonesia and other countries are based on treaties. Indonesia now has extradition treaties with Australia, Hong Kong, India, Malaysia, Papua New Guinea, the Philippines, the Republic of Korea, and Thailand.[42] Indonesia has also signed an extradition treaty with Singapore but the national legislature has not ratified it. The legislature says it considers the treaty to be biased in favour of Singapore and has repeatedly called for the government to renegotiate it.[43]

The 1979 Extradition Law provides that extradition can occur in the absence of a treaty, if in Indonesia's best interests (Article 2). Officials can request extradition of a person who is alleged to have committed crimes, been arrested, or faces prosecution (Article 3(1)). People who assisted, attempted, or conspired to commit a crime can also be extradited if the act is an offence in Indonesia and in the country where it occurred (Article 3(2)). A non-exhaustive list of crimes to which an extradition process may apply appears in an Appendix to the 1979 Extradition Law.

Indonesia will not usually extradite:

- people who will probably be prosecuted or subjected to other action for reasons of religion, political opinion, action nationality, race, or ethnicity (Article 14);
- its own citizens (Article 7(1));[44]
- people for political crimes (Article 5(1));
- people for crimes punishable by death, if the alleged crime does not attract the death penalty under Indonesian law, unless the requesting country guarantees that the death penalty will not be carried out (Article 13);
- if the alleged crime was committed partially or wholly on Indonesian territory (Article 8);
- people already being investigated or prosecuted for similar crimes in Indonesia (Article 9); or
- people already tried and acquitted, or who have served a penal term, in another country for the crimes for which extradition is sought (Article 11).

[42] Margareth S Aritonang, 'RI Targets Fugitives in PNG and Vietnam' *Jakarta Post* (3 February 2015) <http://www.thejakartapost.com/news/2015/02/03/ri-targets-fugitives-png-and-vietnam.html>; 'House Ratifies Extradition Treaty with South Korea' *Jakarta Post* (26 September 2007); 'PNG MP Plays down Indonesia-PNG Extradition Treaty' *Radio New Zealand* (29 May 2015) <http://www.radionz.co.nz/international/pacific-news/274909/png-mp-plays-down-indonesia-png-extradition-treaty>. See also: Law 8 of 1994 on the Ratification of the Extradition Treaty between Indonesia and Australia; Law 1 of 2001 on Ratification of the Agreement Between the Government of the Republic of Indonesia and the Government of Hong Kong for the Surrender of Fugitive Offenders; Law 13 of 2014 on the Ratification of the Extradition Treaty between the Republic of Indonesia and the Republic of India; Law 9 of 1974 on Ratification of the Agreement between Indonesia and the Government of Malaysia on Extradition; Law 20 of 1976 concerning Law 10 of 1976 on Ratification of the Extradition Treaty Between Indonesia and the Philippines; Law 42 of 2007 on Ratification of the Extradition Treaty Between the Republic of Indonesia and the Republic of Korea.

[43] Hasyim Widhiarto, 'Singapore Refuses to Renegotiate Extradition Treaty with Indonesia' *Jakarta Post* (29 September 2011).

[44] Unless it is preferable that the person is tried in the place where the crime was committed (Art 7(2)).

The requesting country can ask Indonesian authorities to make a provisional arrest in urgent circumstances, such as if the person in question might abscond (Articles 18–21). The requesting country must submit the original extradition documents through diplomatic channels or Interpol, or directly by post or telegram, to the chief of police or the prosecutor general (Article 19(1)). For states with an extradition treaty with Indonesia, this must be done within forty-five days of the provisional arrest; for states with no treaty it must be done within twenty days. If these requirements are not met, the arrestee is released.[45]

Extradition requests must be lodged in writing through diplomatic channels with the Minister of Law and Human Rights, for submission to the president (Article 22). The requests are handled by several authorities, including the Ministry of Foreign Affairs and the prosecutor general, but the Ministry of Law and Human Rights primarily coordinates communication between the requesting country and the Indonesian authorities involved throughout the extradition process.

The police will usually conduct searches for, arrest, and charge the requested person, using information and evidence supplied by the requesting country. The police then report their findings to the prosecutor general's office (Article 26), which, within seven days, should issue a summons for the arrested person to attend a hearing in the district court located where the person is apprehended (Article 27). The court will then consider the extradition request and submit its decision, together with relevant documents, to the Minister of Law and Human Rights for further consideration and action (Article 33). There is no formal avenue of appeal, but defendants sometimes lodge them, and courts sometimes hear them. The president has the final say on whether to extradite (Article 36(2)).

This process makes extradition cases vulnerable to pressure from the requesting country, and even domestic Indonesian political considerations. It has also been a source of tension between Indonesia and other countries, particularly where reciprocity of treatment is expected.[46] Because under Indonesian law the final decision about extradition lies with the president, it is possible for the executive to ensure extradition after negotiations with the requesting state. By contrast, many common law countries leave the final decision to the courts, meaning that the executive cannot give such assurances.

KUHAP REFORM

As discussed in Chapter 12, the legislature has included a draft Criminal Code (RUU KUHP) and a draft Criminal Procedure Code (RUU KUHAP) on its list of priority bills for discussion between 2015 and 2019.

The RUU KUHAP contains 286 articles, as does the existing Code. Here we consider four contentious issues regulated in the most recent publicly circulated version of the draft. Its contents probably will change significantly before it is enacted, if at all.

First, the draft contains provisions on investigating judges (*hakim pemeriksa pendahuluan*). While apparently intended to replace *praperadilan*, investigating judges have far greater powers, including to assess the legality of arrest, detention, search, seizure of goods, and the tapping of communications. They can also: cancel or suspend detentions; rule that statements made by suspects violate their right against self-incrimination; declare that an investigation or prosecution was conducted for an improper purpose; exclude improperly obtained evidence; ensure that suspects and defendants have legal representation; and, perhaps most controversially, decide whether a case should progress to prosecution (Article 111(1) of the RUU KUHAP).

[45] Antje Missbach, 'The Extradition of People Smugglers from Indonesia to Australia: Political and Legal Challenges' (2014) 15(2) *Australian Journal of Asian Law* 2, 6.

[46] ibid.

The draft also gives investigating judges exclusive power to order the detention of people suspected of committing an offence carrying a sentence of five years' imprisonment or more, or a specified offence (Article 59(1)). Police need to present the suspects they want detained before the investigating judge. Only in emergency circumstances can investigators detain a suspect on their own without authorization from an investigating judge.[47]

While investigating judges appear to be a boon for the rights of suspects and defendants, concern has been expressed about how such powers could be misused to limit the powers of investigators or prosecutors, particularly in corruption cases.[48] Reformists also anticipate that the powers of investigating judges and ordinary law enforcers might overlap, causing jurisdictional conflicts.

A second issue is wiretapping, which the KUHAP does not cover. Under the draft, wiretapping is permitted in relation to twenty 'serious' crimes, including state security offences, abduction, kidnapping, violent theft, extortion, threats, people trafficking, smuggling, corruption, money laundering, counterfeiting, immigration crime, weapons, terrorism, gross human rights violations, narcotics, rape, murder, illegal mining, illegal fishing, and illegal logging (Article 83(2)). An investigating judge must provide authority for such a wiretap, which expires after thirty days but can be extended for another thirty days (Article 83(6)).[49]

These provisions are highly contentious, particularly if they apply to the Corruption Eradication Commission (KPK), which can already wiretap and record conversations when investigating or prosecuting.[50] Anti-corruption activists view imposing conditions on wiretapping as an attempt to shackle the Commission.

Third, the draft gives power to prosecutors to nominate 'crown' or state witnesses. These are suspects or defendants who played a minor role in a particular criminal act. They can be released from prosecution for helping to reveal the involvement of others in the act. Even those playing a larger role in the criminal act can win a reduced sentence by admitting guilt and 'informing' on others, at the discretion of the judge (Article 200).

Finally, Indonesian judges have long bewailed the absence of power to punish contempt of court of the kind commonly enjoyed by judges in common law countries. Controversial and high-profile trials are often accompanied by aggressive demonstrations, both within and outside the courtroom, that disrupt proceedings. Article 212 of the draft would, for the first time, give judges a clear power to prevent this. It requires that judges be shown respect by all those present in the courtroom, and empowers judges to have those who do not behave properly thrown out, after a warning. If the disrespectful behaviour constitutes an offence, those involved can be charged.

SCHAPELLE CORBY CASE STUDY

The case of Australian drug smuggler Schapelle Leigh Corby illustrates many aspects of Indonesian criminal law and procedure discussed above. The former trainee beautician from Queensland was caught at Denpasar Airport on 8 October 2004 attempting to smuggle 4.1kg of marijuana into Indonesia in a bodyboard bag. She denied that the

[47] 'Menahan Tersangka, Kewenangan Hakim Pemeriksa Pendahuluan' *Hukumonline* (11 April 2013) <http://www.hukumonline.com/berita/baca/lt51665dd4d9028/menahan-tersangka--kewenangan-hakim-pemeriksa-pendahuluan>.

[48] 'Ahli Kritik Hakim Komisaris di RKUHAP' *Hukumonline* (15 March 2013) <http://www.hukumonline.com/berita/baca/lt51431dd699b58/ahli-kritik-hakim-komisaris-di-rkuhap>.

[49] 'Aturan Penyadapan, Memangkas KPK' *Hukumonline* (21 March 2013) <http://www.hukumonline.com/berita/baca/lt514abdf2afade/aturan-penyadapan--memangkas-kpk>.

[50] Art 12(1), Law 30 of 2002 on the Corruption Eradication Commission.

marijuana was hers and claimed that Australian baggage handlers planted the drugs in her bag as part of a failed smuggling operation.

The case attracted significant media attention, with many Australians appearing to believe she was innocent.[51] Media reports misreported features of the Indonesian legal system, wrongly asserting that it did not recognize the presumption of innocence, and expressing outrage at the lack of a jury, even though most civil law systems, including more developed systems such as France's, do not always employ them. Rhetoric in Australia was also often racist and unrestrained, with one Sydney radio presenter even describing the judges in the trial as 'monkeys'.[52] The case sparked numerous conspiracy theories and hundreds of websites sprung up to support Corby's cause,[53] with many of her allies doggedly pursuing writers and commentators they believed were biased against her.

Several complaints were raised by Corby's team during the trial process. The marijuana was found in a plastic vacuum-sealed bag inside another plastic bag, at the front of the bodyboard bag. Corby's legal team complained that multiple customs officers touched this outer plastic bag without wearing protective gloves, and neither the inside nor outside bag were tested for fingerprints. Second, they complained that customs officers did not weigh her bags, making it impossible to compare the weight of the bags in Denpasar with the weight recorded at Brisbane Airport. If, for example, her bag was heavier on arrival in Denpasar than at the Brisbane check-in counter, this would have supported her baggage-handler case theory. Third, no audio or video recording of the initial discovery of the drugs, nor of the ensuing interrogation in the interview room, was provided, even though the customs area of Ngurah Rai Airport was monitored by closed-circuit television cameras. Finally, the Bali Police did not provide the marijuana for forensic testing.[54]

Corby was eventually sentenced to twenty years in prison by the Denpasar District Court. This was reduced to fifteen years on appeal to the High Court but increased again to twenty years on subsequent appeal to the Supreme Court. In 2012, Corby received a five-year sentence reduction from then-President Susilo Bambang Yudhoyono, in part over concerns about her mental health. Combined with regular remissions, she left prison on parole in 2014. In 2017 she was released and returned to Australia. The following section examines the trial, her appeals, remissions, and clemency process.

Denpasar District Court trial

Corby's trial began at the Denpasar District Court on 28 January 2005. She was charged with the import, export, sale, and distribution of Category I narcotics under Article 82(1)(a) of Law 22 of 1997 on Narcotics, with secondary charges relating to the transit and possession of narcotics under the same Law.

[51] Australian Associated Press, 'Australians Find Corby Innocent in TV Program' *Sydney Morning Herald* (18 May 2005) <http://www.smh.com.au/news/World/Australians-find-Corby-innocent-in-TV-program/2005/05/18/1116361619728.html>.

[52] The remarks were made by 2GB presenter Malcolm T. Elliott in a discussion with a caller, as follows:

> 'ELLIOTT: The judges don't even speak English, mate, they're straight out of the trees, if you'll excuse my expression.
> CALLER: Don't you think that disrespects the whole of our neighbouring nation?
> ELLIOTT: I have total disrespect for our neighbouring nation, my friend. Total disrespect … Whoa, give them a banana and away they go.'

See Eric Ellis, 'The Whingers of Oz' *The Spectator* (11 June 2005) <http://archive.spectator.co.uk/article/11th-june-2005/13/the-whingers-of-oz>.

[53] See, for example, The Expendable Project <http://www.expendable.tv/>.

[54] 'Weighing the Evidence' *Sydney Morning Herald* (4 March 2005) <http://www.smh.com.au/articles/2005/03/04/1109700677359.html>.

When questioned during the trial, Corby denied that the marijuana was hers but could provide no convincing evidence in her defence. John Patrick Ford, an Australian who had been detained awaiting trial in Victoria, provided hearsay evidence to support her case. Ford testified that while in prison he overheard conversations about drugs being smuggled by baggage handlers, one indicating that a third person had placed the cannabis in Corby's bag. On cross-examination Ford refused to name the third person, so the evidence was inadmissible.[55] Even if it was admissible, it is likely that, applying Indonesian evidence law, his evidence would have been accorded little weight, if any. This is because he was not a witness in the sense that he heard or witnessed the crime itself.

As in all Indonesian trials, once the presentation of evidence was complete, the prosecution outlined its sentencing submissions. The import offence carried a maximum penalty of death but prosecutors only sought life imprisonment.

On 27 May 2005, the panel of judges issued a verdict and sentence, which, in Indonesia, usually occurs at the same hearing. Corby was found guilty of importing marijuana, and was sentenced to twenty years in prison and a fine of Rp 100 million.[56] The time she had spent in detention was deducted from her sentence, as per Article 33 of the KUHP.

Appeal and cassation

Corby appealed and, in July 2005, the Denpasar High Court agreed to hear the appeal but remitted the case to the Denpasar District Court to hear new evidence. On 11 October 2005, the Denpasar High Court reduced her sentence to fifteen years, based on its finding that marijuana was not as dangerous as other drugs in 'Class 1'.

Both Corby and prosecutors then sought cassation before the Supreme Court. Her application was rejected on 12 January 2006 but the Court upheld the prosecution appeal. The Supreme Court reinstated the original twenty-year sentence, finding that the 1997 Narcotics Law did not distinguish between substances within 'Class I'. Marijuana, therefore, could not be considered less dangerous than other Class I narcotics.[57] The Supreme Court also considered that the higher sentence would have a deterrent effect and was needed to protect 'Bali's tourism image/reputation'.[58]

Reconsideration (*Peninjauan Kembali*)

Following the reinstatement of her original sentence, Corby submitted a reconsideration request on 3 February 2006. In it, she argued that the Denpasar District Court, the Denpasar High Court, and the Supreme Court had all made errors when applying the law. In particular, she claimed that Article 82(1) of the 1997 Narcotics Law had been wrongfully applied. Prosecutors had failed to prove that she was a dealer, user, or had a network, as required by Article 82(1). They had also not produced two pieces of valid evidence as required under Article 183 of the KUHAP. Corby also objected to the High Court's decision not to allow evidence to be given via teleconference. She further complained that her sentence was excessive given that marijuana carried a relatively low health risk. She also provided examples of other Indonesian cases where judges had imposed lighter sentences on defendants found guilty of possessing much larger amounts of marijuana, or large quantities of more serious drugs.

[55] Alan Saunders, 'Indonesian Legal System and Schapelle Corby' *Radio National* (16 April 2005) <http://www.abc.net.au/radionational/programs/saturdayextra/indonesian-legal-system-and-schapelle-corby/3448778>.

[56] Denpasar District Court Decision 29/Pid.B/2005/PN.Dps.

[57] Supreme Court Decision 2221/K/Pid/2005.

[58] ibid.

A different panel of judges to those who decided her cassation application handed down their decision on 28 March 2008. It found that Corby's arguments did not justify reconsideration and displacement of the cassation decision.[59] The panel emphasized that reconsideration requests may only be filed in respect of final and binding decisions and that, in Corby's case, that was the cassation decision of the Supreme Court, not the earlier Denpasar court decisions. The judges also observed that reconsiderations were not intended to be 'fourth court hearings' in which the court heard the case afresh but rather were intended to ensure the correct application of the law. In other words, the issues it could consider in the reconsideration were strictly limited. Corby had already employed disagreements about applying the law as a ground of appeal in the Denpasar High Court. This ground, therefore, could not be used again in the reconsideration.

The Court rejected Corby's contention that the prosecution could not muster two pieces of evidence, as required for a guilty verdict by Article 183 of the KUHAP. Sufficient witness testimony under oath, expert evidence, and physical evidence had been adduced.[60] The panel also disagreed about the heaviness of the sentence, noting that the Supreme Court had properly considered aggravating and mitigating factors and noted them in its decision, as required by Article 197(1)(f) of the KUHAP. In other words, the cassation panel had made no formal jurisdictional or legal errors when deciding the sentence.

Even though the reconsideration panel said that the only relevant decision for reconsideration was the cassation decision, it still considered Corby's argument about the High Court's refusal to allow evidence by teleconference. The panel held that, because teleconferences are not listed as a type of valid evidence under Article 184 of the KUHAP, the High Court had made no judicial error by refusing to allow it. The Supreme Court noted that although use of teleconferencing was not without precedent in Indonesian courts, judges did not have to follow the jurisprudence of other courts. As Indonesia was a civil law system, jurisprudence was only 'persuasive'.[61]

With this ruling, Corby's judicial avenues were exhausted. The only option remaining was a clemency appeal to the president.

Clemency application

In March 2010, Corby appealed to President Susilo Bambang Yudhoyono for clemency, claiming that she was suffering from severe mental illness. As noted, the president can grant clemency and rehabilitation under Article 14(1) of the Constitution, which requires that he or she consider the Supreme Court's views. Many doubted that Corby would succeed.[62] Although the 2002 Clemency Law does not explicitly require the applicant to acknowledge guilt, it does so implicitly. The Law describes clemency as 'a gift from the president in the form of forgiveness (*pengampunan*)' (see General Elucidation). It seems difficult to receive forgiveness without acknowledging wrongdoing or displaying remorse, and Corby refused to do either.

After intense diplomatic activity by Australia, Corby was nonetheless granted clemency on 15 May 2012 by President Yudhoyono, with the passage of Presidential Decision 22/G of 2012. The Supreme Court had been consulted and, on 22 July 2011, had recommended that clemency be granted because Corby: was suffering from severe depression and needed

[59] Supreme Court Decision 112/PK/Pid/2006 , pp 9 ff. [60] ibid 35.

[61] For a discussion of the use of prior judicial decisions in the Indonesian legal system, see Chapter 4.

[62] 'Indonesia's President to Rule on Clemency for Corby' *The World Today* (5 April 2012) <http://www.abc.net.au/worldtoday/content/2012/s3471623.htm>. We note that Law 5 of 2010 Amending Law 22 of 2002 on Clemency, introduced a one-year time limit for clemency applications. However, this did not apply to Corby, who waited two years to apply. This is because she submitted her application before this Law was passed, meaning that the limit did not apply to her.

regular psychiatric attention; had no criminal record for drug offences in Australia; and maintained her innocence and claimed that the drugs were placed in her bag by an unknown person.[63] The Court's mention of her maintaining innocence was unexpected and hard to understand, given that failure to admit one's crimes at trial can lead judges to impose heavier criminal sentences.

The decision to grant clemency to an unrepentant Corby was met with a huge backlash from politicians and members of the Indonesian public,[64] primarily over concerns that the president was not serious about fighting drugs. The timing of the grant of clemency was also controversial, both in Indonesia and Australia, because it roughly corresponded with Australia's release of three young Indonesian men suspected of people smuggling from a prison in Western Australia. Suspicions arose that this release and Corby's clemency were part of a secret deal between the two governments.[65]

An Indonesian NGO known as the National Anti-Narcotics Movement (Granat, which is short for *Gerakan Nasional Anti-Narkotika* but also means grenade), challenged Corby's clemency before the Jakarta Administrative Court. The Granat team included some of Jakarta's most prominent lawyers, such as Yusril Ihza Mahendra, Maqdir Ismail, and Luhut MP Pangaribuan, and was supported by former Minister of Industry and Trade, Fahmi Idris.[66]

The applicants argued that the grant of clemency violated the principles of good governance that administrative officials must follow under the Administrative Court Law.[67] In particular, they pointed to the president's failure to provide a clear reason for awarding clemency and argued that drug offences were such a grave 'generational threat' that leniency should not have been granted.[68] The Court avoided these arguments, finding—as it did again in the later case of Sukumaran and Chan, discussed above—that clemency decisions were not reviewable because power to issue them was at the absolute discretion of the president.

Remissions and parole

As explained above, all prisoners can receive remissions after they have served a specified portion of their sentence, and have demonstrated good behaviour. Narcotics offenders must now pledge to cooperate with law enforcement officials, but this was not a requirement for most of Corby's sentence. During her imprisonment, Corby reportedly received thirty months of general and special remissions on her fifteen-year sentence.[69]

As mentioned, prisoners are eligible for conditional release after serving two-thirds of their sentence. Initially, it was thought that Corby might not be eligible because she was

[63] 'Tiga Alasan Grasi Corby' *Hukumonline* (25 May 2012) <http://www.hukumonline.com/berita/baca/lt4fbfb7690f500/tiga-alasan-grasi-corby>.

[64] Bagus BT Saragih, 'Corby's Clemency Slammed' *Jakarta Post* (23 May 2012) <http://www.thejakartapost.com/news/2012/05/23/corby-s-clemency-slammed.html>.

[65] Matt Brown, 'Corby Sentence Cut in Deal over People Smugglers: Indonesia' *ABC News* (23 May 2012) <http://www.abc.net.au/news/2012-05-23/corby-sentence-cut-in-return-for-people-smuggler-release/4027236>.

[66] The application was also filed against clemency granted to German national Peter Achmin Franz Grobmaan by Presidential Decision 23/G of 2012.

[67] Art 53(2), Law 9 of 2004 Amending Law 5 of 1986 on the Administrative Court. The applicants referred to Law 9 of 2004, although there had already been a second amendment. Law 51 of 2009 on the Second Amendment of Law 5 of 1986 on the Administrative Court.

[68] Leo Wisnu Susapto and Novrieza Rahmi, 'Granat Tak Hanya Gugat Keppres Grasi Corby' *Hukumonline* (7 June 2012) <http://www.hukumonline.com/berita/baca/lt4fd0cd1454f47/granat-tak-hanya-gugat-keppres-grasi-corby>.

[69] Kate Lamb, 'Schapelle Corby's Release Has Irked Some in Indonesia' *The Guardian* (10 February 2014) <https://www.theguardian.com/world/2014/feb/10/schapelle-corby-release-irked-some-indonesia>.

foreigner and, having been in prison for years, would not have a valid visa on release.[70] In April 2013, however, the government passed Regulation 31 of 2013 on the Implementation of Law 6 of 2011 on Immigration. This regulation allows foreigners to be in Indonesia without a visa if 'serving prison time in a correctional facility' (Article 115(1)(a)). This includes foreign convicts on leave to visit family, leave approaching release, assimilation, and conditional release (elucidation to Article 115(1)(a)).

Corby became eligible for conditional release in May 2012, although she did not apply until October 2013.[71] The Minister of Law and Human Rights granted Corby parole in February 2014. The parole period was set at one year longer than the original sentence (as per Article 15(3) of the Criminal Code), and Corby's parole ended on 27 May 2017.

As discussed, conditional release can be revoked if particular obligations and restrictions are not met (Articles 15a–16 of the KUHP).[72] One ground of revocation is the parolee 'causing unrest' (*menimbulkan keresahan*) in the community. The then Deputy Law and Human Rights Minister, Denny Indrayana, publicly advised Corby against giving a planned interview to Australian media on her release from prison, amid concern that doing so could violate this condition.

In addition to these standard conditions, further requirements are often placed on individual prisoners, and these are regulated through a specific-purpose Law and Human Rights Ministry regulation issued during the period leading up to the release of the prisoner. In Corby's case, she had to report twice a month to the corrections office in Denpasar and was not allowed to break any laws.

[70] 'Blow to Corby Early Release Hopes' *Yahoo news* (14 November 2012) <https://au.news.yahoo.com/world/a/15378057/blow-to-corby-early-release-hopes/>.

[71] This time was needed in part to collect the large number of documents required under Art 54, Ministerial Regulation 21 of 2013.

[72] See Art 85, Ministerial Regulation 21 of 2013 on Requirements and Procedure for Granting Remission, Assimilation, Family Leave, Conditional Release, Leave Approaching Release, and Conditional Leave.

13

Human Rights Law

INTRODUCTION

The introduction of comprehensive domestic legislation on human rights was among the most significant legal reforms made soon after President Soeharto resigned in 1998. His military-bureaucratic regime, the New Order, came to power on the back of an apparent coup attempt in 1965, which was then used to justify the slaughter of around 500,000 members of the Indonesian Communist Party (*Partai Komunis Indonesia*, PKI) and their alleged sympathizers, and the jailing of hundreds of thousands more—some for decades. Soeharto's thirty-two-year reign was characterized by: rigged elections; state interference in the judicial system; restrictions on freedom of association; tight controls over the press; heavy military involvement in politics, business, and everyday life; and repressive crackdowns on dissidents and separatist movements, particularly in East Timor, Aceh, and Papua.

Although Indonesia has been a member of the United Nations (UN) since 1950,[1] and was therefore theoretically bound by the Universal Declaration of Human Rights (UDHR),[2] the New Order explicitly 'rejected the universalism of human rights as an innately Western concept that was alien to East Asia'.[3] The argument for the incompatibility of so-called 'Asian values' with universal human rights was expressed in the Bangkok Declaration of 1993, a statement signed by Soeharto and the chief regional advocates of the 'Asian values' debate, Lee Kuan Yew of Singapore and Dr Mahathir Mohammad of Malaysia. This 'Asian values' discourse was used by the New Order to justify authoritarian rule and reject calls for reform, which it characterized as 'Western'. The Indonesian state did accede to two key human rights instruments under Soeharto—the Convention on the Elimination of Discrimination Against Women (CEDAW) and the UN Convention on the Rights of the Child.[4] But because Indonesia had not ratified other international human rights instruments, the impact of these conventions was very limited.

After 1998, a strong desire to break from the repressive Soeharto years spurred major legislative reforms on human rights and the adoption of key international human rights instruments within only a few years. Indonesia ratified the Convention Against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments (CAT) and the International Labour Organisation Convention on Freedom of Association and Protection on the Right to Organise in 1998, and the Convention on the Elimination of All Forms of Racial Discrimination (CERD) in July 1999. In late 2005, Indonesia passed laws to ratify the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). It acceded to both Covenants in early 2006.

[1] Indonesia withdrew from the UN on 1 January 1965 and rejoined in September 1966. The UN has treated this as a break in cooperation rather than withdrawal.

[2] P Eldridge, 'Human Rights in Post-Soeharto Indonesia' (2001) IX(1) *Brown Journal of World Affairs* 127. Although the UDHR is not legally binding, it is considered to inform the human rights provisions in the UN Charter, which is binding on states. This is discussed further below in the section on the UDHR.

[3] Tim Lindsey, 'Indonesia: Devaluing Asian Values, Rewriting Rule of Law' in RP Peerenboom (ed), *Asian Discourses of Rule of Law* (RoutledgeCurzon 2004) 286.

[4] Eldridge (n 2) 131.

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Domestically, the national legislature enacted a Human Rights Law in 1999 and a Human Rights Court Law in 2000. However, perhaps the most significant domestic reforms were constitutional, with an extensive Charter of Rights inserted into a new Chapter XA of the Constitution. These rights were modelled closely on the UDHR.[5] Within a decade of Soeharto's fall, Indonesia had developed one of the strongest 'on-paper' legal regimes for human rights protection in Southeast Asia, perhaps rivalled only by the Philippines. However, as we shall see in this chapter, implementation and enforcement of this regime has been very problematic.

The post-Soeharto era has also witnessed the emergence of a resilient network of human rights organizations. From a weak base, these organizations have become highly skilled in investigating and cataloguing human rights abuses, policy research, and reform advocacy. They include organizations prominent during the Soeharto era, such as the Legal Aid Foundation (*Lembaga Bantuan Hukum*, LBH) and its regional networks, the Indonesian Forum for the Environment (*Wahana Lingkungan Hidup Indonesia*, Walhi), and organizations established just before, or soon after, the New Order regime's collapse, such as the Commission for the Disappeared and Victims of Violence (*Komisi untuk Orang Hilang dan Korban Kekerasan*, KontraS), the Institute for Policy Research and Advocacy (*Lembaga Studi dan Advokasi Masyarakat*, ELSAM), Imparsial (the Indonesian Human Rights Monitor), the Alliance of Independent Journalists (*Aliansi Jurnalis Independen*, AJI), the Setara Institute for Peace and Democracy, and the Human Rights Working Group.

This much stronger legislative framework and a more robust civil society network, has not, however, translated into effective implementation and enforcement. Activists attribute these current failings partly to the inability of the Indonesian state to adequately address impunity for past human rights abuses.[6] Few senior military figures have faced court for human rights violations committed during the New Order period, even fewer have been convicted, and almost all have been acquitted on appeal. Gross violations of human rights, such as the 1965–66 massacres, violence committed by the armed forces in East Timor and Papua, the Petrus (*Penembak Misterius* or Mysterious Shooter)[7] killings of 1982–85, the Talangsari incident in 1989, the forced disappearances of student activists in 1997–98, and the May 1998 riots, among many others, also remain unresolved.

At the national political level, there is now at least a rhetorical consensus that Indonesia is a state based on law that should protect human rights. However, although the 'Asian values' debate has largely been abandoned, Indonesian politicians and public figures still depict human rights in Indonesia as being different to human rights in the West, which they characterize as unchecked freedom, or '*HAM sebebas-bebasnya*'.[8] Politicians and courts invoke Article 28J(2) of the Constitution—which requires constitutional rights to give way to other rights, if another purpose is served, such as religious values or public order—to justify restricting constitutional rights, including those which the Constitution expressly refers to as 'non-derogable'.[9] Equally, while Islamic traditions include fundamental concepts of human rights, some Muslim groups consider human rights to be a Western project designed to challenge or weaken Islam.[10]

[5] Other relevant reforms included lifting restrictive media licensing arrangements, dismantling the repressive Ministry of Information, and providing freedom of expression and association. These are discussed in Chapter 21.

[6] See the statements of Usman Hamid, former director of KontraS, in FIDH, Imparsial, and Kontras, 'Shadows and Clouds: Human Rights in Indonesia' (International Federation for Human Rights 2011) <https://www.fidh.org/IMG/pdf/Indonesie552ang.pdf>.

[7] This is sometimes also given as *Penemabakan Misterius* or 'mysterious shootings'.

[8] Endah Lismartini and Ade Alfath, 'Ketua Komisi VIII: LGBT Tak Bisa Dilegalkan di Indonesia' *viva.co.id* (28 January 2016). See also statement from Lukman Hakim Saifuddin in Constitutional Court Decisions 2/PUU-V/2007 and 3/PUU-V/2007.

[9] 'Hidayat: Banyak Yang Salah Kaprah Soal Implementasi HAM' *Tempo* (13 February 2016).

[10] Sidney Jones, 'Islamist Civil Society and Violent Extremism' in Tim Lindsey and Helen Pausacker (eds), *Religion, Law and Intolerance in Indonesia* (Routledge 2016) 262.

This chapter begins by examining the key international human rights instruments ratified by Indonesia and then reviews the primary domestic legislative human rights statutes passed, and constitutional reforms effected, since the New Order's collapse in 1998. We do not consider the debate about whether international law—and even treaties that Indonesia has properly signed and duly ratified—automatically form part of Indonesian law or require further 'transformation'. This chapter then examines key national human rights institutions, including the National Commission on Human Rights (Komnas HAM) and the National Commission on Violence Against Women (*Komnas Perempuan*) before offering brief case studies illustrating problems that have emerged in applying human rights law.

INTERNATIONAL LAW INSTRUMENTS ON HUMAN RIGHTS RATIFIED BY INDONESIA

Universal Declaration of Human Rights

Indonesia became the sixtieth member of the UN when it joined on 28 September 1950. The Universal Declaration of Human Rights (UDHR) was adopted by the UN General Assembly in 1948 and is considered the fundamental statement of human rights. Although not formally binding on member states, the UDHR was intended as 'a common standard of achievement'. There is a widespread view that it 'constitutes an authoritative interpretation' of the human rights obligations in the UN Charter,[11] which binds member states.[12] Many, but not all, provisions of the UDHR are now considered part of customary international law, meaning that they are increasingly seen as binding, even on non-member states.[13]

Article 1 of the UDHR states that all humans are born free and equal. Article 2 declares that everyone is entitled to the same rights without discrimination. Articles 3–11 further elaborate individual rights, including the right to life and the rights to freedom from slavery and torture. Articles 12–21 include key civil and political rights, such as freedom of religion, expression, and association. Articles 22–27 cover social, cultural, and economic rights. Finally, Articles 28–30 detail the responsibilities of individuals, groups, and states to respect human rights.

Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was ratified by Indonesia in 1984, through passage of Law 7 of 1984. However, Indonesia expressed a formal reservation to the jurisdiction of the International Court of Justice (ICJ).[14] In 2000, Indonesia signed the Optional Protocol to CEDAW, which establishes a complaints mechanism and allows the Committee on the Elimination of Discrimination Against Women to investigate grave or systemic violations of the Convention,[15] but has not yet ratified it.

[11] Dinah Shelton, 'Soft Law' in James David Armstrong (ed), *Routledge Handbook of International Law* (Routledge 2009) 74.

[12] Kirsten Hastrup and Camilla Elisabeth H Kjeldsen (eds), 'Legal and Functional Universality', *Human Rights on Common Grounds: The Quest for Universality* (Kluwer Law International 2001) 46.

[13] Shelton (n 12) 74.

[14] See <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>.

[15] United Nations, Department of Public Information, 'Optional Protocol to Women's Convention Comes into Force', WOM/1242 (21 December 2000), <http://www.un.org/womenwatch/daw/cedaw/protocol/wom1242.htm>.

Article 1 of CEDAW defines discrimination against women as any:

> distinction, exclusion, or restriction made on the basis of sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of marital status, on the basis of equality between men and women, of human rights or fundamental freedoms in the political, economic, social, cultural, civil, or any other field.

Articles 2 and 3 require concrete measures—including laws, policies, and practices—to advance the rights of women and eliminate discrimination against them.

The Indonesian government has issued various laws to give effect to the Convention. These include Presidential Decision 181 of 1998 on the Formation of the National Commission of Violence Against Women (*Komnas Perempuan*), replaced by Presidential Regulation 65 of 2005 on Komnas Perempuan. Presidential Instruction 9 of 2000 on Gender Mainstreaming in National Development requires ministers and subnational politicians to consider gender when making policy and planning development, and when implementing, monitoring, and evaluating those policies and plans. Also relevant are Law 23 of 2003 on Child Protection; Law 21 of 2007 on the Elimination of Human Trafficking; and Minister of Women's Empowerment Regulation 1 of 2008 on Guidelines for Improving Quality of Life for Women.

Convention on the Rights of the Child

As mentioned, the Convention on the Rights of the Child (CRC) was ratified during the New Order era, through Presidential Decision 36 of 1990.

The CRC consists of fifty-four articles. It classifies as a child any person below the age of eighteen years, unless the laws of the member country specify a younger legal age for adulthood (Article 1). The Convention states that in all actions concerning children, the rights of the child must be the primary consideration (Article 3). Every child has the right: to a standard of living adequate for the child's physical, mental, spiritual, moral, and social development (Article 27); to have a name from birth and to be granted a nationality (Article 7); to express an opinion and to be considered in all matters affecting him or her (Article 12); to freedom of thought, conscience, and religion (Article 14); and to education (Articles 28 and 29). Article 32 requires states to protect children from work that threatens their health, education, or development; set minimum employment ages; and regulate employment conditions.

On 24 September 2012, Indonesia ratified two Optional Protocols to the Convention, on the involvement of children in armed conflict and on the sale of children, child prostitution, and child pornography, by Laws 9 and 10 of that year, respectively.[16]

Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment

As mentioned, during Soeharto's reign, including in its final year, many students were reportedly abducted and tortured by the military regime, primarily for protesting against the government. Some simply disappeared, never to be seen again. During the first few months in power of Soeharto's successor, Bacharuddin Jusuf (BJ) Habibie, Indonesia ratified the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), through Law 5 of 1998. However, just as it did with CEDAW, Indonesia submitted a reservation that excluded ICJ jurisdiction.[17]

[16] United Nations Treaty Collection, *11b Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (United Nations 2000); United Nations Treaty Collection, *11c Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (United Nations 2000).

[17] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, UN Treaty Series, vol 1465.

Article 1 of the Convention defines torture as an act which—by imparting severe pain or suffering, mental or physical—seeks to obtain from a person information or a confession; to punish, intimidate, or coerce that person or another person; or for any reason based on discrimination. For the purposes of the Convention, such an act must be committed by, at the instigation of, or with the consent or acquiescence of, a public official or someone acting in an official capacity. It does not include pain and suffering arising from lawful sanctions.

The Convention requires state parties to prescribe torture as a criminal act, but there is debate about whether Indonesia has met this obligation. In its first report to the UN Committee Against Torture in 2001, the Indonesian government argued that torture was covered by Law 39 of 1999 on Human Rights and Interim Government Regulation 1 of 1999 on Human Rights Courts (which later became Law 26 of 2000 on Human Rights Courts). Indonesia also claimed that torture was effectively prohibited under Articles 351–58 of the Criminal Code (*Kitab Undang-undang Hukum Pidana*, or KUHP) relating to 'maltreatment', and Article 50 of the Criminal Procedure Code (*Kitab Undang-undang Hukum Acara Pidana*, or KUHAP), which requires suspects to be investigated immediately and prohibits arbitrary detention or ill-treatment of suspects.[18] Manfred Nowak, the UN the Special Rapporteur on torture, argues that these provisions do not constitute full compliance with CAT. According to Nowak, maltreatment as defined in the KUHP lacks several elements of the CAT definition of torture, namely, purpose, mental pain or suffering, and agency (that is, perpetrated or ordered by a public official). He also noted that torture must attract adequate sanctions even if it does not cause physical injuries. According to the special rapporteur, the decisive criterion for torture as a crime is 'the intention of infliction of severe pain or suffering, whether physical or mental, on a powerless person (above all a detainee) for a specific purpose, such as extraction of information or a confession', not simply whether it resulted in injury.[19]

In its 2003 report to the Committee, Indonesia sought to deflect criticism by pointing out that torture was much more comprehensively defined in a draft Criminal Code, which would 'enter into force at the earliest moment possible'.[20] However, more than a decade later, the draft remains far from enactment, as explained in Chapter 10.

International Covenant on Economic, Social and Cultural Rights

Indonesia ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) by enacting Law 11 of 2005 on 23 February 2006.

The ICESCR consists of thirty-one articles, and provides rights: to self-determination (Article 1); freedom from discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; and equal entitlements for men and women to all ICESCR rights (Article 3). Other rights include: just and fair work, and trade union membership (Articles 6–8); social security (Article 9); protection and assistance for families (Article 10); adequate standards of living (Article 11); physical and mental health (Article 12); education (Articles 13–14); and participation in cultural life (Article 15).

[18] UN Committee Against Torture, 'UN Committee against Torture: Addendum to the Initial Reports of States Parties Due in 1999, Indonesia' (2001) paras 69–70.

[19] Manfred Nowak, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak: Addendum: Mission to Indonesia* (United Nations 2008).

[20] UN Committee Against Torture (CAT), *UN Committee Against Torture: Addendum to the Second Periodic Reports of States Parties Due in 2003, Indonesia*, 28 September 2005, CAT/C/72/Add.1.

When it ratified the ICESCR, Indonesia made this reservation:

> With reference to Article 1 of the ICESR, the Government of [the] Republic of Indonesia declares that, consistent with the Declaration on the Granting of Independence to Colonial Countries and Peoples, and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, and the relevant paragraph of the Vienna Declaration and Program of Action of 1993, the words 'the right of self-determination' appearing in this article do not apply to a section of people within a sovereign independent state and cannot be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.

This declaration is not surprising given Law 11 of 2005 was passed after East Timor voted to split from Indonesia in 1999 and separatist conflict in Aceh and Papua stoked fears about state disintegration.[21]

International Covenant on Civil and Political Rights

Indonesia ratified the International Covenant on Civil and Political Rights (ICCPR) through Law 12 of 2005, and acceded to the Covenant on 23 February 2006. Indonesia expressed a reservation to Article 1 of the Convention which, like the ICESCR, affirms the right to self-determination.

Indonesia has not ratified the two Optional Protocols to the Convention. The first Optional Protocol establishes a complaint-receiving mechanism and allows the Human Rights Committee to investigate complaints from victims of rights violations. The second Optional Protocol seeks to abolish the death penalty.

The ICCPR provides the rights to:

- self-determination and to freely dispose of one's natural wealth and resources (Article 1);
- equality between men and women in the enjoyment of civil and political rights (Article 3);
- life and survival (Article 6);
- freedom from torture, cruel, inhumane, or degrading treatment or punishment (Article 7);
- freedom from slavery and servitude (Article 8);
- liberty and security of the person and freedom from arbitrary arrest or detention (Article 9);
- freedom from imprisonment on the ground of inability to fulfil a contractual obligation (Article 11);
- liberty and freedom of movement (Article 12);
- equality before the law; to be presumed innocent until proven guilty; and to have a fair and public hearing by an impartial tribunal (Article 14);
- recognition as a person before the law (Article 16);
- privacy (Article 17);
- freedom of thought, conscience, and religion (Article 18);
- freedom of opinion and expression (Article 19);
- peaceful assembly (Article 21);
- freedom of association (Article 22);

[21] See, for example, Felix Heiduk, 'State Disintegration and Power Politics in Post-Suharto Indonesia' (2014) 35(2) *Third World Quarterly* 300.

- marry and found a family (Article 23);
- participate in public affairs, to vote, to be elected, and to access public services (Article 25);
- equality before, and equal protection of, the law (Article 26) and
- enjoy one's culture, practise one's religion, and use one's language (for members of religious, ethnic, or linguistic minorities) (Article 27).

Article 2 requires state parties to respect the rights of people within their jurisdiction, without discrimination, and to adopt laws and other measures to give effect to those rights, including providing legal recourse for pursuing violations. Article 24 provides various children's rights, and Article 20 prohibits propaganda advocating war or national, racial, or religious hatred.

Article 28 of the Convention establishes the Human Rights Committee, which assesses state parties' implementation of the Convention. Indonesia's progress was assessed in 2013. The Committee noted that some national statutes and regional regulations conflict with articles in the Convention.[22] Awareness of the Convention among police, prosecutors, judges, and lawyers was generally poor, except for Constitutional Court judges. The Committee issued four recommendations:

1. Establish a court to investigate the forced disappearances that occurred during 1997 and 1998, and effectively prosecute other past human rights violations, such as the murder of human rights defender Munir Said Thalib on 7 September 2004.
2. Reinstate the de facto moratorium on the death penalty and consider abolishing the death penalty by ratifying the Second Optional Protocol to the Covenant. The Committee stressed that narcotics crimes do not constitute 'the most serious crimes' under the Covenant, as Indonesia has repeatedly argued, and the Constitutional Court has accepted. The Committee asked Indonesia to consider commuting all death sentences imposed on persons convicted for drug crimes.
3. Repeal Ministry of Health Regulation 1636 of 2010, which authorizes female genital mutilation and cutting by medical practitioners. The Committee urged Indonesia to prohibit this.
4. Repeal Law 1 of 1965, commonly called the Blasphemy Law, and provide adequate protection against violence perpetrated against members of religious minorities.

At the time of writing, the government had made no progress on the first recommendation; had increased use of the death penalty, particularly for narcotics crimes (as discussed in Chapter 10), thereby contradicting the second; and had followed the third recommendation. As for the fourth, the Blasphemy Law remains on the books, having had its constitutionality confirmed by the Constitutional Court, and its use appears to be increasing.

Convention on the Rights of Persons with Disabilities

Indonesia signed the Convention on the Rights of Persons with Disabilities on 30 March 2007 and ratified it with Law 19 of 2011. Indonesia has not signed the Optional Protocol to the Convention, which creates a Committee on the Rights of Persons with Disabilities that investigates complaints from aggrieved individuals.[23]

The Convention consists of fifty articles, most which affirm the rights of persons with disabilities to equal enjoyment of rights outlined in documents like the ICCPR and

[22] United Nations, International Covenant on Civil and Political Rights, 'Concluding Observations on the Initial Report of Indonesia', Human Rights Committee, 21 August 2013, CCPR/C/IDN/CO/1.

[23] UN General Assembly, Optional Protocol to the Convention on the Rights of Persons with Disabilities, Doc. A/61/49 (2006), entered into force 3 May 2008.

ICESCR. Article 5 declares that 'state parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds'.

At the time of writing, Indonesia had just passed a Law on people with disabilities, which is discussed below. This replaced a 1997 Law long criticized by human rights and disability activists for employing a medical model of disability and being generally outdated.[24]

Convention on the Elimination of All Forms of Racial Discrimination

Indonesia acceded to the Convention on the Elimination of All Forms of Racial Discrimination (CERD) on 25 July 1999 by Law 29 of 1999. As with other agreements, Indonesia refused to submit to the ICJ's jurisdiction.

The CERD defines racial discrimination as:

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life (Article 1).

Again, Indonesia's ratification of this Convention under President Habibie appeared directed towards righting some of the wrongs of the Soeharto era, and some of the social conflict that precipitated his fall. As the economy worsened after the 1997 Asian Economic Crisis, anti-Chinese sentiment turned violent in parts of Indonesia, as discussed below. Many Chinese were killed, injured, raped, and assaulted, and their property damaged or stolen. At the time of Indonesia's accession to the Convention, dozens of government regulations openly discriminated against ethnic-Chinese Indonesians. Presidential Decision 240 of 1966, for example, required Chinese Indonesians to adopt Indonesian-sounding names, and Presidential Instruction 14 of 1967 banned the celebration of Chinese culture.

Besides signing the Convention, Habibie issued Presidential Instruction 26 of 1998, which banned the use of the terms *pribumi* (indigenous) and *non-pribumi* (non-indigenous, understood as a reference to the ethnic Chinese) in all government documentation. His successor, President Abdurrahman Wahid, repealed the ban on Chinese cultural celebrations, and recognized Confucianism as a state-sanctioned religion. Law 40 of 2008 on the Elimination of Racial and Ethnic Discrimination was also enacted. Despite these advances, many regulations that discriminate against Chinese Indonesians remain, although most are not usually actively enforced.[25]

DOMESTIC HUMAN RIGHTS LAW 1945 CONSTITUTION

In 1999, the year after the New Order ended, the Indonesian People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*, MPR) embarked on an incremental process of constitutional reform. The original 1945 Indonesian Constitution was a very short, hastily

[24] Nicola J Edwards, 'Disability Rights in Indonesia? Problems with Ratification of the United Nations Convention on the Rights of Persons with Disabilities' (2014) 15(1) *Australian Journal of Asian Law* <http://papers.ssrn.com/abstract=2459818>.

[25] Presidential Decision 69 of 200; Minister of Home Affairs Decision 477/805/Sj of 2000. In fact, Confucianism had been recognized as an official religion in the Elucidation to Art 1 of Law 1 of 1965 (the so-called `Blasphemy Law'). Wahid's public acknowledgment of Confucianism was important, however, because its legal status had become confused and unclear under the New Order. See T Lindsey, `Reconstituting the Ethnic Chinese' in T Lindsey and H Pasuacker (eds), *Chinese Indonesians: Remembering, Distorting, Forgetting* (Institute of Southeast Asian Affairs, Monash Asia Institute) 15–40, at 59–60. See alsoJemma Purdey, *Anti-Chinese Violence in Indonesia, 1996–1999* (Singapore University Press 2006) 216.

assembled, document that was only ever intended to be temporary. This sparse document provided the framework for the highly centralized authoritarian regimes established by Soekarno (from 1959 to 66) and Soeharto (from 1966 to 98).

The process of constitutional reform from 1999 to 2002,[26] while imperfect, resulted in a 'thoroughly democratic document' and allowed for the preservation of institutions that protected pluralism.[27] The original version of the Constitution mentioned only a handful of human rights, but even these could not be said to be 'guaranteed', much less 'protected', because the Constitution required only that the rights be 'regulated by statute'. Article 28, for example, stated: 'freedom of association and assembly, freedom of expression and the like, shall be prescribed by statute'. Far from providing for such rights, this provision allowed the state to restrict them as it saw fit.[28]

As mentioned, the Second Amendment added a new Chapter XA to the Constitution, largely modelled on the UDHR, granting broader constitutional protection of human rights than do many developed states.[29] These rights include:

- the right to life, and to sustain life and livelihood (Article 28A);
- the right to form a family and continue lineage through a valid marriage (Article 28B(1));
- the right of every child to live, grow, and develop, and to protection from violence and discrimination (Article 28B(2));
- the right of every person to develop themselves by fulfilling their basic needs, obtain an education, and obtain benefits from science and technology, art and culture, to increase their quality of life and further the wellbeing of humankind (Article 28C(1)). Article 31(1) reiterates the right to education;
- the right of every person to advance themselves by collectively upholding their rights to develop the community, nation, and state (Article 28C(2));
- the right to just legal recognition, guarantees, protection, and certainty, and to equal treatment before the law (Article 28D(1)). Article 27(1) reiterates the right to equal treatment before the law;
- the right to employment and to receive just and appropriate reward and treatment in an employment relationship (Article 28D(2)). Article 27(2) reiterates the right to employment and a decent livelihood;
- the right to equal opportunity in government (Article 28D(3));
- the right to citizenship (Article 28D(4)). The right to citizenship is reiterated in Articles 26 and 27;
- the right of every person to embrace a religion and worship in accordance with their religion; to choose their education, teaching, employment, and citizenship; to choose a residence within the territory of the state; and to leave and return to the state (Article 28E(1)). Article 29(2) of the Constitution reiterates the right to religion and to worship in accordance with religious beliefs. It also states, however, that Indonesia is a state 'based on belief in an almighty God'. Freedom of religion or belief therefore does not include freedom to be an atheist or agnostic;
- the right of every person to hold a belief, and express their opinions in accordance with their conscience (Article 28E(2));

[26] Denny Indrayana, *Indonesian Constitutional Reform, 1999–2002: An Evaluation of Constitution-Making in Transition* (Kompas 2008).

[27] Horowitz (n 7).

[28] Timothy Lindsey, 'Constitutional Reform in Indonesia: Muddling towards Democracy' in Timothy Lindsey (ed), *Indonesia: Law and Society* (2nd edn, Federation Press 2008) 29.

[29] ibid.

- the right to associate, assemble, and express an opinion (Article 28E(3)). Strangely, the original Article 28 is retained, along with the clause, 'shall be prescribed by statute';[30]
- the right of every person to communicate and obtain information to develop themselves and their social environment, and to seek, obtain, possess, keep, process, and convey information using all available means (Article 28F);
- the right of every person to protection of themselves and their families, of their honour, dignity, and property, and to a feeling of security and protection from threats (Article 28G(1));
- the right to freedom from torture or degrading treatment, and to obtain political asylum from other countries (Article 28G(2));
- the right to physical and mental wellbeing, a place of residence, a healthy environment, and health care (Article 28H(1));
- the right to assistance and special treatment to obtain the same opportunities and benefits to achieve equality and justice (Article 28H(2));
- the right to social security that allows holistic self-development (Article 28H(3)); and
- the right to personal property that cannot be arbitrarily appropriated (Article 28H(4));
- the right to protection against discriminatory treatment (Article 28I(2)); and
- the right to cultural identity and traditional rights (Article 28I(3)). Article 18B(1) of the Constitution reiterates protection of traditional rights.

The Constitution acknowledges that the state must protect, advance, enforce, and fulfil human rights and that human rights will be guaranteed, regulated, and stipulated by law (Article 28I(4)–(5)). However, Article 28J(2) states:

> The rights set out above may be limited by legislation directed at protecting the rights and freedoms of others, and which accords with moral considerations, religious values, security and public order in a democratic society.

Article 28I(1) stipulates that the right to life, the right to freedom from torture, the right to freedom of thought and conscience, freedom of religion, freedom from slavery, the right to be recognized as an individual before the law, and the right to not be prosecuted under a law of retrospective application are non-derogable and 'cannot be limited under any circumstances'.

Despite the explicit language of Article 28I(1), it appears these rights are subject to limitation under Article 28J(2) of the Constitution, just as are other constitutional rights. This is because a majority of the Constitutional Court has, relatively consistently, decided that Article 28I(1) should not be viewed or interpreted in isolation, but rather should be read alongside Article 28J(2). In this way, the Court has refused to accord any special status to Article 28I(1) rights, contrary to what appears to be the clear intent of the Constitution drafters, expressed in Article 28I(1) with the words 'cannot be limited under any circumstances'.

The interpretation of Article 28I(1) was at issue in a case brought before the Constitutional Court in 2007 by various applicants, including members of the so-called 'Bali Nine' group of Australian drug smugglers.[31] They challenged the constitutionality of provisions in Law 22 of 1997 on Narcotics that allowed judges to hand down the death penalty. The applicants argued that these provisions contravened the constitutional right to life, which, they said, are classified by Article 28I as non-derogable.

[30] This seems to have been a drafting error.
[31] Constitutional Court Decisions 2/PUU-V/2007 and 3/PUU-V/2007.

A Constitutional Court majority rejected this argument, holding that the death penalty did not violate the right to life, as even that right was subject to limitation. The Court heard expert testimony from Lukman Hakim Saifuddin and Patrialis Akbar,[32] who as members of the MPR from 1999 to 2004, had been involved in the 2000 constitutional amendment rounds during which the new human rights provisions were inserted. They were asked to describe the thinking behind the inclusion of the new human rights provisions. Both testified that the MPR intended that *all* new human rights would be subject to limitation. In our view, reliance on this testimony as representative of the MPR's views was misplaced. The testimony might have reflected the views of Saifuddin and Akbar, but could hardly be said to have encapsulated the views of the several hundred members of the MPR, who, after all, unanimously agreed to the precise wording of Article 28I(1).

A further issue has arisen about the Constitutional Court's interpretation of Article 28J(2) in the context of the right to religious freedom. The text of Article 28J(2) is broadly similar to Article 18(3) of the ICCPR,[33] to which Indonesia, as mentioned, acceded in 2006. A notable difference is, however, that the drafters of the amended Constitution added to Article 28J(2) a phrase not present in the ICCPR: 'religious values'.[34] This is significant, because in recent years the government has invoked Article 28J(2) to justify restrictions on the rights of religious minorities.

In 2009, religious freedom activists challenged the Blasphemy Law (Presidential Decision 1/PNPS of 1965 on the Prevention of Abuse and/or Defamation of Religion) in the Constitutional Court. One of their complaints was that the Blasphemy Law contradicted the right to religious freedom under Article 28E of the Constitution. By recognizing only six 'official' religions, they argued, the Law unfairly restricted the rights of religious minorities. The government and other opponents of the challenge, meanwhile, pointed to Article 28J(2) to justify government regulation of religion.[35] The Constitutional Court accepted their argument, holding that 'Article 28J(2) of the Constitution is different from Article 18 of the ICCPR and is an explicit and legitimate limitation on the right to religious freedom for the purpose of protecting the rights of the religious majority in the Indonesian context'.[36]

Article 28I(1) also includes non-retroactivity as a right that cannot be limited. In the early years of Indonesia's democratic transition, reformists pushed the government to address gross human rights violations allegedly committed by the Indonesian military in East Timor. The 1999 Human Rights Law and Article 43 of Law 26 of 2000 on Human Rights Courts, discussed in detail below, both provide for the establishment of ad hoc human rights tribunals to adjudicate past violations of human rights. The Human Rights Courts Law specifically states that the principle of non-retroactivity does not apply to gross human rights violations (Article 43). In other words, gross human rights violations can be pursued and violators punished under laws, and by institutions, that did not exist when the violations took place.

[32] Within a decade, Akbar had himself become a judge of the Constitutional Court but was discharged from the Court for corruption before he could complete his first term. In September 2017, he was convicted at first instance by the Jakarta Anti-corruption Court and jailed for eight years.

[33] Art 18(3), ICCPR: Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

[34] Melissa Crouch, 'Judicial Review and Religious Freedom: The Case of Indonesian Ahmadis' (2012) 34 *Sydney Law Review* 545.

[35] Jeremy Menchik, *Islam and Democracy in Indonesia: Tolerance without Liberalism* (Cambridge University Press 2016) 83.

[36] Decision of the Constitutional Court 140/PUU-VII/2009, p 276. For a thorough discussion of the Constitutional Court challenge see Crouch (n 35); Jeremy Menchik, 'Productive Intolerance: Godly Nationalism in Indonesia' (2014) 56(3) *Comparative Studies in Society and History* 591.

These statutory provisions allowing for retrospective prosecutions clearly contradict Article 28I(1) of the Constitution. As the highest law, the Constitution should trump these statutes. However, the Constitutional Court has ruled that Article 28J(2) allows the government to pass legislation that may limit the retrospectivity protection in Article 28I(1). This the Court did in 2004, when it heard a challenge to Article 43 of the Human Rights Court Law submitted by former East Timor Governor Abilio Jose Osorio Soares, who was facing prosecution in the human rights tribunal. A majority refused to invalidate the provision, despite its retroactive operation. The Court acknowledged that the right to be free from retrospective prosecution was 'textually formulated' as absolute but held that it must nonetheless be read in conjunction with Article 28J(2). The Court ruled that within the framework of 'fulfilling just demands in accordance with moral, religious, security and public order considerations', the right could be set aside.[37]

In a challenge to Law 16 of 2003 on Terrorism by 2002 Bali Bombing convict Masykur Abdul Kadir, however, a slim majority of Constitutional Court judges found that Indonesians have the right to be free from prosecution under a retrospective law.[38] The majority ruled that Kadir could not be charged under the Anti-Terrorism Law, which was enacted six days after the 2002 Bali Bombings took place. They declared that the retrospectivity protection in Article 28I(1) 'could not be diminished under any circumstances'. The judges did, however, leave open the possibility that the provision could be set aside in cases of gross violations of human rights:

> The application of the retroactivity principle in criminal law is an exception permitted … only in cases of gross violations of human rights … According to the Rome Statute of 1998, gross human rights violations include genocide, crimes against humanity, war crimes, and crimes of aggression. Article 7 of [Indonesia's] Law 39 of 1999 on Human Rights classifies only genocide and crimes against humanity as gross human rights violations. Therefore … the Bali Bombing … cannot be categorised as an extraordinary crime for which the [prohibition can be set aside] but rather as an ordinary crime which was very cruel but which can still be dealt with under existing criminal law.[39]

Human Rights Law

In 1998, six months after taking over from Soeharto, then-President Habibie convened a special session of the MPR at which ground-breaking reforms were introduced. During the session, the MPR set the constitutional reform process in motion, and issued several decisions that have shaped the trajectory of Indonesia's subsequent legal development. One such decision was MPR Decision XVII on Human Rights, which, among other things, called on the DPR to enact a human rights statute.

The DPR did just this in September 1999, when it enacted Law 39 of 1999 on Human Rights. Article 2 declares:

> The Republic of Indonesia acknowledges and upholds human rights and basic human freedoms as rights that are inherent and inalienable, and must be protected, respected and upheld to increase human dignity, prosperity, happiness, intelligence and justice.

The Law lists the rights to:

- life, not be tortured, freedom of thought and conscience, religion, freedom from slavery, be recognized as an individual and equality before the law, and to not be

[37] Constitutional Court Decision 065/PUU-II/2004.
[38] Constitutional Court Decision 013/PUU-I/2003.
[39] Constitutional Court Decision 013/PUU-I/2003, pp 43–44. For a more detailed discussion of this case, see Simon Butt and Tim Lindsey, *The Indonesian Constitution: A Contextual Analysis* (Hart 2012) 206–08.

prosecuted under a law of retrospective application. These are declared to be non-derogable rights that cannot be limited under any circumstances (Article 4);

- equal treatment before the law, and just support and protection from an objective and impartial judiciary (Article 5(1)–(2));
- receive special treatment and protection (for vulnerable members of the community) (Article 5(3));
- pursue legal remedies in national and international fora regarding human rights issues (Article 7(1));
- life, to sustain life and livelihood, peace, happiness and wellbeing, and a healthy environment (Article 9);
- form a family and continue lineage through a valid marriage (Article 10);
- self-development, an education, and obtain benefits from science, technology, art and culture (Articles 11–13);
- communicate; and seek, obtain, possess, keep, process, and convey information (Article 14);
- obtain justice without discrimination (Article 17);
- the presumption of innocence until proven guilty (Article 18(1));
- not be prosecuted under retrospective laws (Article 18(2));
- legal aid (Article 18(4));
- freedom from double jeopardy or *nebis in idem*, as it is known in Indonesia (Article 18(5));
- freedom from slavery (Article 20);
- religious freedom and to worship in accordance with one's religion and belief (Article 22);
- political freedom and freedom of expression (qualified by the need to respect religious values, decency, public order, public interest, and national integrity) (Articles 23 and 25);
- associate and assemble for peaceful purposes and establish political organizations, according to law (Article 24);
- have, obtain, change, maintain, and choose a citizenship status, and enjoy the rights attached to citizenship status (Article 26);
- freedom of movement and residence within Indonesia, and to leave and return to Indonesia (for citizens) (Article 27);
- seek political asylum from other countries, except for perpetrators of non-political crimes or acts that violate UN objectives or principles (Article 28);
- protection for themselves and their families, honour, dignity, and property (Article 29);
- feeling secure and protection from threats (Article 30);
- freedom and privacy in correspondence, except upon the order of a court or other legitimate authority (Article 32);
- freedom from torture and inhumane treatment (Article 33(1));
- freedom from abduction and assassination (Article 33(2));
- freedom from arbitrary arrest, detention, torture, or exile (Article 34);
- own property, that cannot be seized arbitrarily or unlawfully (Article 36);
- work, and to equal pay for equal work regardless of gender (Article 38);
- a place to live and an adequate standard of living (Article 40);

- social security necessary for an adequate existence, and to special facilities and treatment (for people with disability, the elderly, pregnant women, and children) (Article 41);
- care, education, training, and special assistance at the state's expense to guarantee quality of life (for the elderly and people with disability) (Article 42);
- vote in, and stand for, general elections (Article 43(1)); and
- participate in government, and be appointed to any position in it (Article 43(2)–(3)).

The Law also specifies women's rights, including: to representation in politics (Article 46); to education (Article 48); to work of their choosing (Article 49); to bring legal action (Article 50); and in marriage (Article 51). The Law also refers to the rights of indigenous communities (Article 6).

The Law recognizes and protects children's rights from conception onwards (Article 52(2)). The Law lists children's rights that largely mirror general rights mentioned above, including rights to:

- life, maintain life and improve the child's standard of living from conception (Article 53(1));
- a name and nationality from birth (Article 53(2));
- special care, education, training, and assistance at the expense of the state (for children with a disability) (Article 54);
- freedom of religion, thought, and expression (Article 55);
- an adopted parent or guardian if the child's biological parents cannot fulfil their obligations (Article 56(2));
- be raised, cared for, educated, and guided through life by their biological parents until adulthood (Article 57(1));
- legal protection against physical and mental violence, neglect, mistreatment, and sexual assault (Article 58);
- not be separated from their parents against their wishes, except for valid legal reasons and in their best interests (Article 59);
- education and schooling (Article 60(1));
- seek, receive, and impart age-appropriate information 'if it accords with moral and ethical values' (Article 60(2));
- rest and play with children of their own age (Article 61);
- adequate health services and social security (Article 62);
- not be involved in war, armed conflict, social unrest, and other violence (Article 63);
- protection from financial exploitation and dangerous work (Article 64);
- protection from sexual exploitation and abuse, abduction and child trafficking, and from misuse of narcotics, psychotropics and other addictive substances (Article 65);
- freedom from torture, inhumane legal punishment, life imprisonment, or the death penalty (Article 66(1)–(2)); and
- effective legal aid and access to a private hearing before an objective and impartial children's court (Article 66(6)–(7)).

The Human Rights Law also clarifies that every person in Indonesia must comply with Indonesian law, including unwritten law, and international human rights laws ratified by Indonesia (Article 67), which are themselves deemed to be part of national law (Article 7(2)). The Law allows for public participation in human rights matters and gives individuals and organizations the right to submit a report on human rights violations to Komnas HAM or other organizations working on human rights (Article 1010).

On the one hand, the Law requires the government to respect, protect, uphold, and promote the human rights in the Law, other domestic laws, and international law ratified by Indonesia (Article 71). On the other, the Law permits the limitation of human rights by statute, solely for:

> the purposes of guaranteeing recognition and respect for the basic rights and freedoms of other people, or for issues of morality, public order, or national interest (Article 73).

Komnas HAM

The National Commission on Human Rights (*Komisi Nasional Hak Asasi Manusia*, commonly known as Komnas HAM) was established in 1993 by presidential decision. The Human Rights Law consolidates Komnas HAM's institutional position, strengthens its legal basis, and expands its functions. We discuss the establishment, functions, and performance of Komnas HAM later in this chapter.

Human Rights Court Law

Article 104 of the 1999 Human Rights Law required establishment of a human rights court system within four years of the Law's enactment. However, the violent aftermath of East Timor's independence referendum on 30 August 1999 forced Indonesia to act much sooner. A UN-appointed International Commission of Inquiry on East Timor and three special rapporteurs recommended the establishment of an international tribunal to try perpetrators of serious violations of human rights that occurred in East Timor in 1999, unless Indonesia urgently dealt with the matter itself.[40]

In response, on 23 November 2000, the DPR enacted Law 26 of 2000 on the Human Rights Court (the Human Rights Court Law). These courts are in county and city capitals (Article 3). They try gross human rights violations (Article 4), which include genocide and crimes against humanity, according to the Rome Statute of the International Criminal Court (Article 7 and its elucidation). The Law defines genocide as 'any action intended to destroy or exterminate, in whole or in part, a national group, race, ethnic group, or religious group',[41] and crimes against humanity as 'any action perpetrated as a part of a broad or systematic direct attack on civilians'.[42] The courts have jurisdiction over Indonesian citizens, even if they perpetrate gross violations of human rights outside Indonesia (Article 5).

Human rights investigations, prosecutions, and trials follow standard criminal procedure, unless the Law provides otherwise (Article 10).

[40] ICG, *Indonesia: Impunity versus Accountability for Gross Human Rights Violations* (International Crisis Group 2001).

[41] The Law specifies that this may occur by: a) killing members of the group; b) causing serious bodily or mental harm to members of the group; c) creating conditions of life that would lead to the physical extermination of the group in whole or in part; d) imposing measures intended to prevent births within the group; or e) forcibly transferring children of the group to another group (Art 8). This definition does not cover the ancillary crimes of complicity, attempt, incitement, and conspiracy: Paul Dalton and Fergus Kerrigan, 'The Human Rights Courts and Other Mechanisms to Combat Impunity in Indonesia' (2006) 5(2) *Article 2 16* <http://curis.ku.dk/ws/files/156052563/FergusKerriganPaulDalton_TheHumanRightsCourtsandothermechanismstocombatimpunityinIndonesia_2006.pdf>.

[42] The Law specifies that this may take the form of: (a) killing; (b) extermination; (c) enslavement; (d) forced eviction or movement of civilians; (e) arbitrary appropriation of the independence or other physical freedoms in contravention of international law; (f) torture; (g) rape, sexual enslavement, forced prostitution, forced pregnancy, forced sterilization, or other similar forms of sexual assault; (h) persecution of a particular group or association based on political views, race, nationality, ethnic origin, culture, religion, sex or any other basis, regarded universally as contravening international law; (i) forced disappearance of a person; or (j) apartheid (Art 9).

Table 13.1 Limits on detention under the Human Rights Courts Law

Phase of criminal procedure	Limits of detention	Law on the Human Rights Court
Arrest	24 hours	Article 11(5)
Investigation (*penyidikan*)	Maximum of 240 days (90 days, with possible extension for further 150 days, if approved by the chief judge of the relevant human rights court)	Article 13(1)–(3)
Indictment (*penuntutan*)	Maximum of 70 days (30 days, with possible extension for further 40 days, if approved by chief judge of the relevant human rights court)	Article 14(1)–(3)
Trial (*pemeriksaan*)	Maximum of 120 days (90 days, with possible extension for further 30 days, if approved by chief judge of the relevant human rights court)	Article 15(1)–(2)
Appeal	Maximum of 90 days (60 days, with possible extension for further 30 days, if approved by chief judge of the relevant human rights court)	Article 16(1)–(2)
Cassation	Maximum of 90 days (60 days, with possible extension for further 30 days, if approved by chief judge of the relevant human rights court)	Article 17(1)–(2)

The periods for which suspects and defendants can be detained under the Human Rights Court Law are summarized in Table 13.1 and are longer than the limits established in the Criminal Procedure Code for general crimes (discussed in Chapter 11).

Crucially, preliminary inquiries (*penyelidikan*) into allegations of gross violation of human rights can *only* be conducted by Komnas HAM (Articles 18(1)–(2)). The Law defines preliminary investigation as 'actions to look for and find the existence or otherwise of an incident suspected of constituting a gross violation of human rights, to be followed by a [full] investigation' (Article 1(5)). If Komnas HAM believes it has gathered sufficient preliminary evidence, it must hand over the results of its investigation to prosecutors. Under the Human Rights Court Law, prosecutors directly arrest and investigate anyone strongly suspected of a gross violation of human rights, based on sufficient preliminary evidence (Article 11(1)). These are functions which, for most crimes, are performed only by the police.

Komnas HAM depends on prosecutors to take its preliminary investigations to full investigation stage and, ultimately, to trial. However, prosecutors have often refused to continue Komnas HAM-initiated investigations. Prosecutors have no obligation to proceed, and commonly return Komnas HAM briefs of evidence for being 'incomplete' (see Article 20). In this way, they have been able to thwart efforts to pursue those responsible for gross violations of human rights. These include the violations that occurred during the brutal crackdown on the Indonesian Communist Party (PKI) and its alleged sympathizers in 1965 and 1966.[43]

If prosecutors decide to proceed to a full investigation (*penyidikan*), but this fails to produce sufficient evidence to prosecute after the detention periods mentioned above expire, the attorney general must terminate the investigation. An investigation can only then be reopened if additional justifications and evidence for prosecution emerge. Victims and

[43] See, for example, 'AGO Rebuff of PKI Report a Blow to Human Rights' *Jakarta Post* (12 November 2012).

their families can challenge a termination in a pre-trial motion before the chief justice of the relevant court (Article 22(1)–(6)).

Prosecutors are also responsible for prosecution (*penuntutan*) of these cases, which must proceed within seventy days of the investigation process concluding (Articles 23–24). A panel of five judges, comprising two career judges and three ad hoc judges, appointed from outside the career judiciary, preside over these cases. Ad hoc judges must have experience in human rights and are appointed for five-year terms (Articles 28–29). These decisions are subject to appeal in a provincial High Court (also presided over by a five-judge panel, with two judges and three ad hoc judges (Article 32(2))) and then the Supreme Court. The Law establishes time limits within which cases must be resolved at each level.[44]

The Law on the Human Rights Court provides protections and benefits for victims. Article 34 states that victims and witnesses of gross violations of human rights have the right to physical and mental protection from threats, disturbances, intimidation and violence, and that law enforcement officials must provide such protection at no cost to those witnesses and victims. They also have the right to compensation, restitution, and rehabilitation under the Law, as do their heirs (Article 35).

The Human Rights Court Law imposes heavy penalties for gross violations of human rights, as indicated in Table 13.2. Those who attempt or conspire to commit, or assist the committing of, these crimes face the same penalties as direct perpetrators (Article 41).

Significantly, the Law introduces 'crimes of omission' that apply against military commanders, police, and civil servants who failed to prevent gross violations of human rights that they knew about (Article 42).[45] Although modelled on the Rome Statute, Article 42 differs in one important way. Article 42(1) states that a military commander 'can' (*dapat*) be held accountable for offences committed by his or her subordinates, whereas the Rome Statute uses the mandatory 'shall'.[46]

Perhaps the most controversial provision of the Law is Article 43, which allows for an ad hoc tribunal to try gross violations of human rights occurring before the Law came into force. This can happen if the DPR recommends it and the president supports it. As mentioned, prosecution of past gross violations of human rights appears to contradict Article 28I(1) of the Constitution, which seems to declare the right to not be prosecuted under a law with retrospective application is non-derogable.

As discussed, whether Article 28I(1) renders Article 43 unconstitutional was tested when Abilio Jose Osorio Soares, the last governor of East Timor when it was still part of Indonesia, sought its review before the Constitutional Court in 2004.[47] The Court rejected Soares' claim, holding that Article 43 did not violate Article 28I(1). For the Court, an exception to the principle of non-retroactivity applied to the ad hoc human rights tribunals, because they were established only to handle specific incidents, and because gross violations of human rights were so abhorrent that they justified this exception. Further, the Court emphasized that ad hoc human rights tribunals could only be established by the national legislature. Because this institution is the 'embodiment of the people', the Court reasoned that the people ultimately determine which gross violations of human rights could be tried in an ad hoc tribunal.[48]

[44] Human Rights Courts have 180 days from the date on which the case is brought before the Court (Art 31); High Courts have ninety days (Art 31(2)), as does the Supreme Court (Art 33).

[45] The Indonesian Military Criminal Code also recognizes the concept of command responsibility in Arts 127, 129, and 132. Art 132 provides that superiors who fail to prevent criminal acts by their subordinates will be subject to prosecution, but only as accomplices.

[46] Dalton and Kerrigan (n 42) 2.

[47] Constitutional Court Decision 65/PUU-II/2004.

[48] Constitutional Court Decision 65/PUU-II/2004, p 36.

Table 13.2 Sentences for genocide and crimes against humanity under the draft KUHAP

Crime	Sentence	Article
Genocide: a. killing members of a group; b. causing serious bodily or mental harm to members of a group; c. creating conditions of life that would lead to the physical extermination of a group in whole or in part; d. imposing measures intended to prevent births within a group; or e. forcibly transferring children of a group to another group	Death, life in prison, or 10–25 years in prison	Article 36
Crimes against humanity: a. killing; b. extermination; c. forced displacement or movement of civilians; d. arbitrary appropriation of the independence or other physical freedoms in contravention of international law; or e. apartheid	Death, life in prison, or 10–25 years in prison	Article 37
Crimes against humanity: a. slavery; or b. torture	5–15 years in prison	Articles 38–39
Crimes against humanity: a. rape, sexual enslavement, forced prostitution, forced pregnancy, forced sterilisation, or other similar forms of sexual assault; b. persecution of a particular group or association based on political views, race, nationality, ethnic origin, culture, religion, sex or any other basis regarded universally as contravening international law; or c. forced disappearance of a person	10–20 years in prison	Article 40

The Child Protection Law

The DPR enacted the Child Protection Law in 2002 to bring Indonesian law into line with the UN Convention on the Rights of the Child (CRC), which Indonesia ratified in 1990. This statute was amended by Law 35 of 2014. Accordingly, the Law bases child protection on the CRC's four principles: non-discrimination; the best interests of the child; the rights to life, survival, and development; and respect for the opinions of children (Article 2).[49]

The Law—which defines a child as a person under eighteen years of age, including children still in the womb (Article 1(1))—grants to them rights to:

- live, grow, develop, and participate normally in society, and be protected against violence and discrimination (Article 4);
- a name, citizenship (Article 5), and a birth certificate (Articles 27 and 28);
- practise religion, and think and express themselves (Article 6);
- know, be raised and cared for by their own parents (though fostering or adoption is permitted where a child's parents cannot guarantee the child's growth and development, or the child is neglected or abandoned) (Article 7);

[49] Also mentioned as bases for protection are the national ideology, Pancasila, and the 1945 Constitution.

- health care and social security (Article 8);
- an education and training, including special education for both children with a disability and gifted children (Article 9);
- speak and be heard, and receive, seek and impart information (Article 10);
- rest and recreation, enjoy free time, mix with other children of their age, and express creativity (Article 11);
- rehabilitation, social assistance, and social welfare, for every disabled child (Article 12);
- protection from: discrimination; exploitation of an economic or sexual nature; neglect; harsh treatment; violence; abuse; and injustice from their parents or any party responsible for their care (Article 13);
- protection from misuse in political activities; and involvement in armed conflict, social unrest, violent events, war, and sexual crime (Article 15);
- protection from abuse, torture, or inhumane punishment (Article 16(1));
- liberty, with arrest, detention, or criminal prosecution being a last resort, and only by law (Article 16(2)–(3));
- humane treatment, be kept separate from adults if incarcerated, legal aid, and a fair trial, closed to the public (for children who are detained) (Article 17(1));
- confidentiality of identity (for every child who has dealings with the law, including victims or perpetrators of sexual abuse) (Article 17(2)); and
- legal and other assistance (for child victims and suspected perpetrators of criminal offences) (Article 18).

The Law also imposes obligations. It states that children must: respect their parents, guardians, and teachers; love their families, community, nation, and state; care for their friends; practise their religion in accordance with its teachings; and uphold noble values and ethics (Article 19). The Law also requires parents and families to

> care for, raise, educate, and protect children; ensure the growth and development of children in accordance with their capabilities, talents and interests; prevent child marriage; and provide character education and cultivate manners (Article 26).

If parents neglect their obligations to their children, then another parent, sibling or relative (up to the third degree) can request a court order that the parents be supervised or their parental rights revoked (Article 30). Any resulting court decision must stipulate the person, or government or community organization that will take responsibility for the child. Any individual who performs this task must be of the same religion as the child (Article 31).[50]

The state and government, meanwhile, must respect and guarantee children's rights without discrimination (Article 21), including to express an opinion (Article 24); and oversee and provide facilities for child protection (Article 22). Chapter IX of the Law describes various protections that must be provided: religion (Articles 42–43); health care (Articles 44–47); education (Articles 48–54); social support (Articles 55–58); and 'special protections' (Articles 59–71). These include a requirement that government ensures optimal comprehensive healthcare for every child from conception, which should be provided free of charge to families of limited means (Article 44(1)–(4)).

The government must provide at least nine years' basic education for all children (Article 48). This should be free, and families with limited means should receive assistance, as should neglected or abandoned children, and children living in remote areas

[50] Guardianship, foster care, and adoption are further described in Arts 33–41 of the Law.

(Article 53). Children with a disability must be able to receive both mainstream ('inclusive') and special education (Article 51). At school, children must be protected against violence, sexual crime, and abuse from teachers, managers, and schoolmates (Article 54).

The Law introduces the concept of 'special protection', which the government or an authorized state institution must provide to children:

a. in emergency situations;[51]
b. who come before the law;
c. from a minority or isolated group;
d. who are economically or sexually exploited;
e. who are victims of the abuse of narcotics, alcohol, psychotropic substances, and other addictive substances;
f. who are victims of pornography;
g. with HIV or AIDS;
h. who are victims of kidnapping and trafficking;
i. who are victims of physical or psychological violence;
j. who are victims of sexual crimes;
k. who are victims of terrorist networks;
l. with disability; or
m. who are neglected or abandoned (Article 59).

Articles 77–90 establish sanctions for violating children's rights. Penalties range from up to three years and six months' imprisonment or a Rp 72 million fine for cruelty, mistreatment (*penganiayaan*), violence, or the threat of violence (Article 80(1)), through to the death penalty, life in prison or between five and twenty years in prison and a Rp 50–500 million fine for involving children in drug abuse, production, or distribution (Article 89(1)). Corporations, too, can be fined for violations (Article 90).

The Law also established the independent Indonesian Commission for the Protection of Children (*Komisi Perlindungan Anak Indonesia*, KPAI), discussed below.

In 2016, the brutal gang rape and murder of a fourteen-year-old girl by fourteen men in Bengkulu province, Sumatra, sparked a national debate over gender-based violence and child protection. The national outcry over the case eventually prompted President Joko Widodo to issue Interim Emergency Law 1 of 2016, which was endorsed by the DPR on 12 October.[52] This amended the 2002 Law on Child Protection, revising Articles 81 and 82, and inserting two new Articles, 81A and 82A. These controversial revisions made the death penalty, chemical castration, and the implantation of electronic monitoring devices available as punishments for child sex offenders.

Truth and Reconciliation Commission Law

The DPR enacted Law 27 of 2004 on the Truth and Reconciliation Commission in September 2004, following lengthy debate with civil society activists.[53] Article 3 provided for the establishment of the Commission to resolve past gross violations of

[51] Art 60 states that children in emergency situations include: refugees; victims of rioting or social disturbance; victims of natural disaster; and children caught up in armed conflict.

[52] 'Indonesia Passes Chemical Castration Law for Paedophiles' *BBC News* (12 October 2016).

[53] Jeff Herbert, 'The Legal Framework of Human Rights in Indonesia' in Tim Lindsey (ed), *Indonesia: Law and Society* (2nd edn, Federation Press 2008) 469.

human rights without bringing them to court, to bring about national reconciliation and unity.[54]

During debates preceding the Law's enactment, military figures reportedly objected to the emphasis on truth (*kebenaran*)-telling in resolving past violations, preferring a stronger focus on reconciliation. Others, meanwhile, preferred the term 'holding to account' (*pertanggungjawaban*).[55] Prominent civil society organizations, including Imparsial, Kontras, and the Legal Aid Foundation, rejected the idea, fearing that it would do little more than offer legal impunity to offenders. There was a risk, they believed, that perpetrators could use the truth and reconciliation process to avoid prosecution by an ad hoc tribunal established under the Human Rights Court Law (see above). They maintained that true reconciliation required processing former perpetrators through the courts.[56]

The most contentious aspects of the Law were, however, its amnesty provisions. The Law established an Amnesty Consideration Sub-commission (Article 16(c)), to which perpetrators of abuses committed before 2000 could confess, and which could mediate between victims and perpetrators (Article 23).[57] The Commission could recommend amnesties to the president, who, if in agreement with the Commission, could forward them to the DPR for consideration. If the DPR agreed with the recommendations, the president could grant them.[58] Again, human rights organizations argued that these would perpetuate impunity—a likely outcome, because Article 44 states that gross violations of human rights resolved by the Commission would no longer be justiciable by an ad hoc human rights court. Others argued that reconciliation would be difficult, if not impossible, without amnesties.[59]

Ultimately, however, the Commission was disbanded even before it could be established. A coalition of human rights organizations—including Elsam, Imparsial, and Kontras—and several individuals challenged the constitutionality of the Law's amnesty provisions in 2006. The Constitutional Court declared that Article 27 of the Law, which allowed for compensation and rehabilitation if an amnesty request was upheld, was unconstitutional and that, because the whole Law hinged on Article 27, the entire Law was unconstitutional.[60]

Domestic Violence Law

Law 23 of 2004 on the Elimination of Domestic Violence (the Domestic Violence Law) is considered a landmark statute by Indonesia's gender equality movement. After Soeharto fell, the National Commission on Violence Against Women (Komnas Perempuan),[61] and a coalition of around sixty civil society organizations, led a vocal campaign for specific legislation addressing violence against women.[62] Before the Law's enactment in September 2004, domestic violence was covered only loosely in the Criminal Code, under the category of 'crimes against morality'. As prominent human rights lawyer Nursyahbani Katjasungkana noted, this framed cases of violence against women as a moral issue, rather than focusing on the consequences of the crime. In rape cases, courts would therefore focus on the moral character of the victim, rather than whether a rape had been committed.[63]

[54] The Law used the same definition of 'gross violations of human rights' as the Human Rights Court Law (see Art 1(4)).

[55] Priyambudi Sulistiyanto, 'Politics of Justice and Reconciliation in Post-Suharto Indonesia' (2007) 37(1) *Journal of Contemporary Asia* 73.

[56] ibid 90. [57] Herbert (n 54) 470.

[58] For further discussion of the law relating to amnesty, see Chapter 12 on criminal procedure law.

[59] Sulistiyanto (n 56) 90. [60] Constitutional Court Decision 006/PUU-IV/2006, p 31.

[61] Komnas Perempuan itself was established in the period immediately following the fall of Soeharto, in response to the rape of ethnic Chinese women that occurred during the May 1998 riots. See further below.

[62] Philippa Venning, 'Marrying Contested Approaches: Empowerment and the Imposition of International Principles: Domestic Violence Case Resolution in Indonesia' (2010) 46(3) *Journal of Development Studies* 397.

[63] Nursyahbani Katjasungkana, 'Gender and Law Reform: Overcoming Barriers' in Tim Lindsey (ed), *Indonesia: Law and Society* (2nd edn, Federation Press 2008).

The Law defines domestic violence as any act against anyone, particularly a woman, resulting in physical, sexual, psychological misery or suffering, or household neglect, including any threat to commit an unlawful act, coercion, or deprivation of freedom within the household (Article 1(1)). 'Households' are: (a) a husband, wife, and children; (b) individuals in the household related to them by blood, marriage, care, or guardianship; or (c) domestic workers living in the household (Article 2(1)–(2)).

Domestic violence offences are 'complaint offences' (*delik aduan*), meaning that police can investigate only if a victim, or someone on their behalf, makes a complaint (Articles 26(1)–(2), 27). The Law prohibits: physical violence; psychological violence; sexual violence; and household neglect. Physical violence is behaviour causing pain, illness, or serious injury (Article 6); and psychological violence is causing fear, loss of confidence, loss of an ability to act, feelings of powerlessness, and/or severe psychological suffering (Article 7). Sexual violence, meanwhile, is forced sexual relations with someone living in the household, or forcing another household member to have sexual relations for commercial or other purposes (Article 8(a)–(b)). As for neglect, anyone required to financially support, treat, or care for an individual within a household must not neglect that person, including by causing economic dependency by prohibiting that person from working (Article 9(1)–(2)).

The Law has a strong victims-right focus. Article 10 describes victims' rights to court-ordered protection from family, police, prosecutors, courts, lawyers, and social organizations. The Law also outlines victims' rights to medical and pastoral care, privacy in the management of their cases, and social support and legal aid at every stage of the investigation or examination process (Article 10). The government must formulate policy to eliminate domestic violence; spread awareness about domestic violence; and train and educate about domestic violence, and gender-sensitivity (Article 12(1)). To better serve victims' needs, the government must, for victims: allocate special spaces in police stations; make available officials, medical personnel, social workers, and spiritual advisers; and develop an easily accessible system and service programme. The government must also protect victims' companions, witnesses, family and friends (Article 13).

The Law provides for integrated services for victims, including immediate protection for seven days after the victim's case is accepted (Article 16). To this end, police can work with medical personnel, social workers, volunteer workers, and spiritual advisers.[64] A local district court chief judge (*hakim ketua*) can issue a protection order for up to one year and extend it if necessary, by issuing a court order (Article 32). The Law also provides for rehabilitation, provided by health workers, social workers, volunteer companions, or spiritual advisers (Articles 39–43).

As for penalties, physical violence attracts a maximum of five years' imprisonment or a Rp 15 million fine. If the victim dies, then punishment increases to a maximum of fifteen years in prison and a Rp 45 million fine (Article 44(1) and (4)). The maximum penalty for psychological violence, meanwhile, is three years in prison or a Rp 9 million fine (Article 45(1)); and for sexual violence is twelve years and Rp 36 million (Article 46). This is consistent with Article 285 of the Criminal Code, which also imposes up to twelve years' imprisonment for using violence or the threat of violence to force a woman to engage in sexual relations. Under the Domestic Violence Law, forcing another person to remain in the house for the purposes of sex carries a jail term of between four and fifteen years or between Rp 12 million and Rp 300 million in fines (Article 47). Neglect, as described under Article 9, carries up to three years in prison or a maximum fine of Rp 15 million (Article 49). Judges can also issue restraining orders against the offender, restrict the offender's rights, or require the offender to undergo counselling (Article 50).

[64] The Domestic Violence Law stipulates requirements for the provision of these, and legal aid services (Arts 18–25).

Discrimination Law

Law 40 of 2008 on the Elimination of Racial and Ethnic Discrimination was enacted to meet Indonesia's obligations under the Convention on the Elimination of All Forms of Racial Discrimination, which the DPR had ratified through Law 29 of 1999. The Law defines racial and ethnic discrimination as differentiation, exception, limitation, or preference based on race and ethnicity that leads to a revocation—or impaired acknowledgement, acquisition, or implementation—of human rights, fundamental freedoms, or equality, in the civil, political, economic, social, and cultural sectors (Articles 1(1) and 4). 'Race' is a group of people distinguished by physical characteristics and lineage, while 'ethnicity' is a grouping based on belief, values, habits, traditions, norms, language, history, geography, and kinship (Article 1(2) and (3)).

Discriminatory behaviour includes race or ethnicity-based hate, such as through publicly displayed text, images, or clothes; public speeches; and murder, assault, rape, abuse, violent theft, or the deprivation of liberty based on racial and ethnic discrimination (Article 4).

The Law requires various protections and measures aimed at eliminating racial and ethnic discrimination, including:

(a) protection, certainty, and equality before the law for all citizens to live free from racial and ethnic discrimination;

(b) protecting individuals, groups, or institutions that need protection, and guaranteeing equal enjoyment of citizens' rights; and

(c) national education to strengthen public understanding about the importance of pluralism and human rights.

The national and regional governments, the community, and all citizens must protect citizens from racial and ethnic discrimination (Article 6). In particular, the government must:

(a) effectively protect citizens who experience racial and ethnic discrimination, and guarantee effective law enforcement when discrimination occurs;

(b) guarantee the right of every citizen to obtain assistance, resolution, and fair compensation for loss and suffering from racial and ethnic discrimination;

(c) support efforts to eliminate racial and ethnic discrimination and guarantee that law enforcement officials and government agencies follow the law; and

(d) renew, revise, revoke, or cancel regulations that discriminate on racial and ethnic lines (Article 7).

The Law requires Komnas HAM to monitor and evaluate government efforts to eliminate racial and ethnic discrimination. It can provide recommendations to national and local governments and, if unheeded, can forward them to the national legislature (Article 8(1)–(2)).

Perpetrators of racial and ethnic discrimination resulting in human rights or equality being limited or revoked face penalties of up to one year's imprisonment and/or a Rp 100 million fine. If hatred or hostility is involved, then five years' imprisonment and/or a Rp 500 million fine can be imposed. And if intentional deprivation of life, assault, rape, abuse, violent theft, or deprivation of liberty results from the discrimination, then the penalties for those offences, provided under other legislation such as the Criminal Code, increases by one-third (Article 17). Those suffering discrimination can seek compensation and rehabilitation (Articles 13–14, 18).

Corporations may also be held criminally culpable for these crimes, including for discrimination its officers perpetrate when acting on behalf of the corporation, and within the corporate environment itself (Article 19(1)). Corporations found guilty of discrimination face fines three times the amounts mentioned above, and can have their business licences

and even their legal status revoked. Corporate executive officers can also be imprisoned for discrimination (Article 21).

Disability Law

Law 4 of 1997 on Disabled People was long criticized by Indonesian civil society activists for treating people with a disability as objects of charity. The Law defined disabled or 'crippled' people (*penyandang cacat*)[65] as people with mental or physical abnormalities that impede their ability to do things as they should (Article 1(1)). Fortunately, Indonesia's legal landscape has much improved in recent years, with significant strides made to fulfil the rights of people with disability. Indonesia ratified the Convention on the Rights of People with Disabilities in 2011[66] and, to meet its Convention obligations, began drafting new legislation in 2013.

The result was Law 8 of 2016 on People with a Disability (the 2016 Disability Law). This Law strengthens the legal framework for people with disabilities in Indonesia. It introduces the social model of disability—that is, the understanding that disability is not an inherent flaw, rather is caused by societal barriers that prevent the full interaction of people living with physical, sensory, intellectual, or psychological limitations.

The 2016 Law describes people with disability as people with long-term physical, intellectual, mental, or sensory limitations, who, through interaction with their environment, can experience difficulties or obstacles to participating fully and effectively with other citizens (Article 1(1)).[67]

The Law grants a relatively large catalogue of 'on-paper' rights to people with disability. These include rights to: life; freedom from stigma; privacy; justice and legal protection; education; work, entrepreneurship or involvement in a cooperative; health; political participation; freedom of religion; involvement in sports; culture and tourism; social welfare; accessibility; public services; protection from natural disasters; rehabilitation; concessions;[68] data collection;[69] live independently and be involved in community life; expression, communication and to obtain information; freedom of movement and nationality; and freedom from discrimination, neglect, torture and exploitation (Article 5(1)).[70]

[65] Like much of the rest of the world, Indonesian terminology for people with disabilities has evolved over recent years. The 1997 Law used the term *cacat*, literally 'flawed' or 'defective'. Following the passage of Law 19 of 2011 on the ratification of the CPWD, it has become more common to use the term *disabilitas*, from the English. Most advocates for the rights of people with disability now prefer the term *difabel*, a portmanteau of the English phrase 'differently abled' or people with 'different abilities'.

[66] By Law 19 of 2011.

[67] There is some inconsistency in the adoption of this social model in the Law, however, as the categorization of types of disability under Art 4(1)–(2) appears closer to a medical understanding of disability. Art 4(1)–(2) of the Law states that 'types of people with disability' include: people with physical disability, people with intellectual disability, people with mental disability; and/or people with sensory disability. These disabilities can be experienced alone, or in combination, over a sustained period, diagnosed by a 'medical technician' in accordance with the law.

[68] According to Art 1(12) of the Law, 'concessions' are all types of discounts provided by the government, local government, or individuals to people with disabilities based on national or regional regulations. Disability activists have expressed concern that this provision has the potential to encourage stigma and social exclusion.

[69] Data on the number of people with disabilities in Indonesia are notoriously poor. The most recent national census from 2010 recorded a prevalence rate of 4.3 per cent, or about 10 million people. Riskesdas (*Riset Kesehatan Dasar*, or Basic Health Survey) data from 2007, meanwhile, shows a prevalence rate of 10–15 per cent. The World Health Organisation (WHO) suggests a more accurate figure would be about 15 per cent of the population, equivalent to 35 million people. See Sri Moertiningsih Adioetomo, Daniel Mont, and Irwanto, *Persons with Disabilities in Indonesia: Empirical Facts and Implications for Social Protection Policies* (Demographic Institute, Faculty of Economics, University of Indonesia in collaboration with Tim Nasional Percepatan Penanggulangan Kemiskinan (TNP2K) 2014). Improved data on people with disabilities are essential for the government in designing policies intended to improve access: Jan Priebe and Fiona Howell, *A Guide to Disability Rights Laws in Indonesia* (Tim Nasional Percepatan Penanggulangan Kemiskinan (TNP2K) 2014) Working Paper 13.

[70] Arts 6–26 spell out these rights in greater detail.

The Law provides additional rights to women with disability, including to reproductive health, to receive or refuse contraception, and to receive additional protection from violence, including sexual exploitation (Article 5(2)). Likewise, children with a disability have rights to: special protection from discrimination, neglect, abuse, exploitation, violence, and sexual crime; treatment and care from their family or substitute family to enable them to develop optimally; have their interests protected in decision-making; humane treatment; fulfilment of special needs; treatment equal to other children, to promote social integration and individual development; and social support (Article 5(3)).

Articles 28–39 require national and regional governments to guarantee and protect the rights of people with disability to equal treatment. Article 29 in particular requires government to provide legal aid for people with disability during all investigations conducted by law enforcement officials.

Articles 40–44 cover the right of people with disability to education, emphasizing inclusive education and requiring government to provide education to them in every stream (formal or non-formal), level (primary, secondary, or tertiary) and type (general, technical, religious, and so on) within the national education system (Article 40(1)–(2)). The government must even provide scholarships for high achieving students with disabilities whose parents cannot afford to pay for their education, and financially support all students with disabilities whose parents cannot fund their education (Article 40(6)–(7)). The Law requires all tertiary institutions responsible for educating teachers to include a unit on inclusive education in their curricula (Article 44).

The Law also strengthens the rights of people with disabilities to, and at, work. Employers must: provide a flexible workplace to suit staff members' needs, without reducing their work targets; offer a flexible work schedule; assist in completion of work tasks, paying attention to the particular needs of the person; and provide accessible accommodation and facilities (Articles 48(b)–(e), 50(1)). Government and state-owned enterprises must ensure that at least two per cent of their staff are people with disabilities; private companies must have at least one per cent (Article 53).

Political rights covered under the Law include to participate in elections and to hold public office (Articles 75–77). The Law reaffirms the right of people with a disability to freedom of religion, and requires governments to encourage or help houses of worship to provide access to people with disabilities (Articles 78–82).

The government must also provide people with disabilities with access to social rehabilitation, welfare, protection, and empowerment services (Article 91). Rehabilitation covers: psychosocial diagnosis and counselling; care and treatment; vocational training; mental, spiritual, and physical support; accessibility; and referral (Article 92). The government must provide social welfare insurance, direct financial aid, and special assistance to people with disabilities who are poor or have no source of income. 'Special assistance' is training, counselling, temporary care, or other assistance (Article 93). 'Social protection', meanwhile, refers to legal aid, social aid, or advocacy (Article 95). 'Empowerment services' are: diagnosis and providing motivation; training and mentoring; providing stimulation; increasing access to markets; and institutional strengthening activities (Article 94).

The Law seeks to improve accessibility for people with a disability. Articles 97–104 focus on improving the accessibility of physical infrastructure, such as buildings, roads, residential areas, public parks, and cemeteries. Articles 105–08, meanwhile, cover provision of accessible public services, such as road, rail, sea, and air transport, and require transportation services to be funded through the state budget and the budgets of corporations that provide public services (Article 105(4)).

The Law recognizes that accurate data on numbers of people with disability and the types of assistance they need are necessary to improve the targeting of policy. The Ministry of Social Affairs must collect and verify such data (Article 117(1) and (3)). People with disabilities who have not already registered with the Social Affairs Ministry can self-report to

their local neighbourhood or village head, who must then convey the information to the county head or mayor, who then passes it on to the minister (Article 119(1)–(4)). People with disabilities are eligible to receive a card that identifies them as a person with a disability (Article 121).

Finally, the Law provides for the establishment of an independent National Disability Commission (Article 131). The Commission must monitor and evaluate the government's efforts in respecting, protecting, fulfilling, and advocating for the rights of people with disabilities (Article 133). However, the Law sets no time limit for the Commission's establishment, providing only that the work functions and selection of members of the Commission are to be set out in a presidential regulation (Article 134). At the time of writing, the Commission had not been established, much to the ire of disability activists.[71] One result is that people with disabilities do not, in practice, enjoy the full catalogue of rights in the 2016 Law, which are rarely, if ever, enforced.

NATIONAL HUMAN RIGHTS COMMISSIONS

National Commission on Human Rights

The National Commission on Human Rights (Komnas HAM) was established by presidential decision in 1993.[72] Decades of economic progress and improved education had given rise to a middle class that was losing patience with the political repression the New Order regime used to maintain power.[73] Komnas HAM was designed to assuage this criticism and discontent and was therefore initially greeted with suspicion, further fuelled by the timing of its establishment. The presidential decision was issued a week before a UN World Conference on Human Rights in Vienna, which Indonesia attended, and a week after a large meeting of foreign donors to Indonesia. At these meetings, the government faced international scrutiny over military-led human rights abuses, particularly after the Santa Cruz massacre in East Timor. Viewing Komnas HAM as a public relations exercise, prominent national human rights activists such as legal aid pioneer Adnan Buyung Nasution reportedly refused invitations to sit as commissioners.[74]

The Commission nonetheless developed into a fierce critic of the ruling regime, producing high-quality and widely praised investigations into security force abuses, and drawing broad public support.[75] The Commission is funded by the state budget, meaning that it is directly accountable to the legislature, rather than the cabinet. However, the Commission's powers and legal mandate were initially weak and, though it undoubtedly helped bolster Indonesia's human rights movement, it could not change government behaviour.[76]

As mentioned, the 1999 Human Rights Law considerably strengthened Komnas HAM's legal basis and mandate. This Law identifies Komnas HAM's main objective as improving the protection of human rights in the interests of the Indonesian people (Article 75(b)). To this end, it conducts research and study; provides education; disseminates information; mediates human rights issues and disputes; and monitors human rights implementation (Article 76(1)). As for its study and research functions, Komnas HAM: examines international human rights instruments to recommend possible accession or ratification in national legislation; publishes studies and assessments; conducts literature reviews, field studies, and comparative research in other countries; discusses issues related to protecting,

[71] Dani Prabowo, 'Pemerintah Diminta Segera Realisasikan Komisi Nasional Disabilitas' *Kompas* (17 February 2017).
[72] Presidential Decision 50 of 1993.
[73] Ken Setiawan, 'From Hope to Disillusion: The Paradox of Komnas HAM, the Indonesian National Human Rights Commission' (2016) 172(1) *Bijdragen tot de Taal-, Land- en Volkenkunde* 1, 5.
[74] ibid 6. [75] Herbert (n 54) 461. [76] Setiawan (n 74) 12.

upholding, and promoting human rights; and conducts human rights research and assessments with organizations or institutions, whether regional, national, or international (Article 89(1)).

The Commission can publicly disseminate human rights information, raise public awareness about human rights, and cooperate with other institutions (whether international, national, or regional) on human rights (Article 89(2)). Since the Law's enactment, Komnas HAM put considerable effort into promoting awareness of human rights issues among the government, civil society, and the public. It produces both annual and thematic reports, and regularly hosts seminars, workshops, and training events.[77]

While research and dissemination had been part of Komnas HAM's mandate since its establishment, its mediation and monitoring powers were introduced by the 1999 Law. These powers allow it to mediate between parties disputing a human rights issue and to resolve the dispute through consultation, negotiation, mediation, conciliation, and expert evaluation. If the mediation succeeds in producing a written agreement signed by both parties, it becomes legally binding and enforceable by a district court (Article 96). The Commission can also make recommendations to the parties about resolving the dispute in the courts, and to the government and DPR about human rights violations (Article 89(4)).

As for monitoring, Komnas HAM is to: report on how human rights are implemented; investigate incidents that are likely to be human rights violations; call victims and witnesses for statements; make site visits and examine property; and provide input for ongoing cases involving human rights violations (Article 89(3)). It must produce an annual report detailing its performance, the status of human rights in the country, and the cases it has handled. This report is delivered to the DPR and the president, with a copy sent to the Supreme Court (Article 97).

The Human Rights Law also expands Komnas HAM's inquiry powers, which include conducting inquiries, summoning relevant parties, and investigating property (Articles 18–19). As mentioned, Komnas HAM, can require witnesses, victims or other parties to provide evidence. If they refuse, Komnas HAM can ask the local district court to force them to attend. In practice, however, witnesses and perpetrators have often ignored Komnas HAM's summonses,[78] and district courts have often refused to compel attendance.[79]

Unfortunately, the Commission lacks power to fully investigate gross violations of human rights. It can conduct preliminary inquiries (*penyelidikan*) to obtain initial evidence but once it has enough evidence to proceed to further criminal investigations (*penyidikan*), it must present that evidence to investigators (*penyidik*) (that is, the police or an ad hoc team of investigators appointed by the prosecutor general). As described above, if investigators believe that the case file is incomplete, they return it to the Commission with directions on what needs completing. The Commission then has thirty days to revise the file (Article 20).

Investigators do not have to proceed with cases Komnas HAM investigates and they often reject them.[80] For example, in 2012, Komnas HAM conducted a major inquiry into atrocities committed against members of the Indonesian Communist Party and their alleged sympathizers in 1965–66. The investigation took four years and found evidence of government involvement in the killings, which, the Commission concluded, constituted a crime against humanity. However, prosecutors returned the case file, claiming there was insufficient evidence to proceed.[81] It is impossible to determine with certainty whether this decision was justifiable, because Komnas HAM was only ever authorized to publish an

[77] Herbert (n 54) 462.
[78] See, for example, 'Kivlan Rejects Komnas HAM Summons' *Jakarta Post* (12 May 2014).
[79] Butt and Lindsey (n 40) 192. [80] ibid.
[81] 'AGO Rebuff of PKI Report a Blow to Human Rights' (n 44).

executive summary of its findings, and the full investigation report remains unreleased, apparently because prosecutors decided not to proceed.[82] However, the prosecutor's decision appears to be highly suspect, given that, as discussed in Chapter 11, prosecutors formally need only two pieces of valid evidence to prosecute in criminal cases. It is highly likely that Komnas HAM's report provided such evidence.

The 1999 Human Rights Law altered Komnas HAM's structure and the selection processes of its members. It now comprises a Plenary Council, consisting of all Commission members, drawn from a broad range of backgrounds, including the justice sector (judges, prosecutors, police, and lawyers); the legislature; the executive or government agencies; and civil society (religious and community leaders, NGO workers, academics) (Article 84(1)). These members must have demonstrated experience in protecting people whose rights have been violated. They are selected by the DPR after a 'fit and proper test' based on recommendations made by Komnas HAM itself, and are appointed by the president to a maximum of two five-year terms, extendable once (Articles 84(1) and 86). The members choose the Commission's chair and two vice-chairs (Article 83(2), (3)). Although the Law states that the Commission comprises thirty-five members, its highest number has been twenty-three, in 2002–07. Even this was unwieldy, so the number of commissioners was reduced to eleven in the 2007–12 period, and thirteen in 2012–17. Only seven commissioners are serving in 2017–22.[83]

Initially, Komnas HAM's rules dictated that the term of each chair should be two and a half years. In 2013, however, nine disgruntled commissioners voted to reduce the term to one year. This was ridiculed by the four remaining commissioners, human rights activists, and even members of the DPR.[84] Although political divisions among commissioners may have played a role in the change,[85] most analyses suggest that petty jealousy over the perks afforded to the chair—such as a better car—was the main motivating factor for the change.[86] Whatever the cause, the spectacle tarnished the organization's reputation when it was already waning, after being criticized for increasing ineffectiveness, paralysed as it was by internal conflicts.

Komnas HAM has four sub-commissions, each representing one of Komnas HAM's key functions, described above (Articles 78–80). The Commission is administered by a secretary general, who is a civil servant but not a Commission member (Article 81).[87] The Law also provided for the establishment of regional branches (Article 76(4)). At the time of writing, regional branches existed in Aceh, West Sumatra, West Kalimantan, Central Sulawesi, Maluku, and Papua.[88]

Indonesian Child Protection Commission

As mentioned, the 2002 Child Protection Law required the establishment of an independent Indonesian Child Protection Commission (*Komisi Perlindungan Anak Indonesia*,

[82] *Komnas HAM Statement on the Results of the Investigation into Gross Violations of Human Rights in the 1965–1966 Incident* (Komnas HAM Ad-Hoc Team for Investigation of Gross Violations of Human Rights in the 1965–1966 Incident 2012) <http://www.komnasham.go.id/sites/default/files/dok-publikasi/EKSEKUTIF%20SUMMARY%20PERISTIWA%201965.pdf>.

[83] Mimin Dwi Hartono, 'Menguji Calon Anggota Komnas HAM' *Kompas* (17 May 2017).

[84] Setiawan (n 74) 21. [85] ibid 22.

[86] Evilin Falanta, 'Ontran-Ontran di Komnas HAM' *KBR* (25 February 2013) <http://portalkbr.com/evilin_falanta/02-2013/ontran_ontran_di_komnas_ham/35052.html>.

[87] The secretary general is supported by bureaus for planning, internal supervision, and cooperation; general affairs; human rights enforcement; and human rights advancement: Komnas HAM Secretary General Regulation 002/PERSES/III/2015 on the Organisation and Work Procedures of the Secretariat General of Komnas HAM. In practice, the secretary general has frequently been at odds with the commissioners, a further cause of tensions and institutional paralysis.

[88] Komnas HAM website, <http://www.komnasham.go.id/>.

KPAI) to improve the effectiveness of child protection (Article 74). To this end, the KPAI is to: raise public awareness of all laws concerning child protection; collect data and information, and receive reports from the community; conduct research and evaluate the Law's implementation; and advise the president about child protection (Article 76).

According to Presidential Decision 77 of 2003 on the KPAI, the Commission has a chairperson, two deputies, a secretary, and five members, drawn from government officials, religious leaders, community leaders, members of community organizations, professional bodies, businesspeople, and community groups concerned with child protection. The president selects these members, after considering recommendations from the DPR. They can sit for up to two three-year terms (Articles 10–11 of the Presidential Decision). The KPAI can set up regional representative offices (Article 9). The national budget funds the Commission's activities (Article 19).

The KPAI works with the National Commission for the Protection of Children (*Komisi Nasional Perlindungan Anak*, Komnas Anak). While KPAI is a statutory authority, Komnas Anak is an NGO, established in 1998 with support from UNICEF as an umbrella body for non-governmental organizations working on child protection.

National Commission on Violence Against Women

The National Commission on Violence Against Women (*Komnas Perempuan*) was established by Presidential Decision 181 of 1998, in the aftermath of widespread sexual violence against ethnic Chinese women in the May 1998 riots.[89] The legal basis of the institution was strengthened by the issuance of Presidential Regulation 65 of 2005 on the National Commission on Violence Against Women. The Commission's objectives are helping eliminate all forms of violence against women and enforce women's rights; and preventing and managing violence against women (Article 2 of the Presidential Regulation).

The primary duties and responsibilities of the Commission are to:

- disseminate information on violence against women to help prevent, manage, and eliminate such violence;
- study and research relevant national legislation and international law instruments;
- monitor and document violence against women and violations of women's rights;
- advise executive, legislative, and judicial institutions to help them develop policy and law that better protects, advances, and enforces women's rights; and
- develop regional and international cooperation to improve protection, enforcement, and advancement of women's rights (Article 4).

Komnas Perempuan has a Plenary Council and an Operational Division (*Badan Pekerja*) (Article 5). The Plenary Council consists of a chairperson, and up to two vice chairs and nineteen members (Articles 6, 8, and 9). It may establish sub-commissions as necessary (Article 11(1)), and, to date, had established sub-commissions on legal and policy reform, monitoring, rehabilitation, education, and community participation. It had also established working groups on migrant workers, Papua, and women and the Constitution and national law.[90] The Operational Division, meanwhile, is chaired by a secretary general, and provides staff and administrative support to the Plenary Council. The Division consists of up to five division coordinators and five sub-commission coordinators (Articles 14–16).

Komnas Perempuan states that it uses, as a framework for its work: the Indonesian Constitution; the 1984 Law on Ratification of the International Convention on the

[89] Komnas Perempuan website: <http://www.komnasperempuan.go.id/profil/>.
[90] Komnas Perempuan website: <http://www.komnasperempuan.or.id/about/struktur-organisasi/>.

Elimination of All Forms of Discrimination Against Women (CEDAW); the 1998 Law on the Ratification of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments (CAT); the UN Declaration on the Elimination of Violence Against Women; and various human rights policies.[91]

HUMAN RIGHTS ENFORCEMENT: CASE STUDIES

East Timor (now Timor Leste)

After the Portuguese withdrew from East Timor in 1974, following centuries of neglectful and brutal colonization, the country descended into civil war, and the leftist Fretilin party eventually declared independence. About a month later, on 7 December 1975, Indonesia invaded East Timor, and in 1976 it was declared Indonesia's twenty-seventh province.[92]

Indonesia's twenty-four-year occupation of East Timor was marked by widespread gross violations of human rights, particularly directed towards the independence movement, which refused to acknowledge Indonesia's claim to sovereignty. Following the New Order's collapse in 1998, Indonesia's newly installed president, Habibie, proposed an independence referendum for East Timor, which was administered by the UN. The Timorese voted overwhelmingly in favour of independence. This took Indonesian leaders by surprise, and fuelled resentment towards the Timorese, who some claimed had failed to appreciate the developmental gains achieved while under Indonesian control. The period leading up to, and immediately after, the vote was marked by widespread murder, torture, sexual violence, illegal detention, kidnappings, destruction of property, and displacement of about 250,000 citizens to West Timor.[93] In 1999, Interfet, a UN international security force led by Australia, was sent in to restore order, and the UN took over government functions until the official handover to an independent government in 2002.[94]

Indonesia came under intense international pressure to act against those who had perpetrated this violence. In response, Komnas HAM established a Commission for Inquiry into Human Rights Violations in East Timor (*Komisi Penyelidikan Pelanggaran HAM*, KPP-HAM).[95] KPP-HAM's mandate was to gather facts, data, and information on violations occurring from January to October 1999. The investigation's focus was whether genocide, mass murders, torture, forced deportment, gender-related crimes, and a scorched-earth campaign had occurred, and, if so, the extent to which Indonesian state institutions were involved.[96]

The Commission delivered its final report in January 2000, and found evidence strongly indicating:

> a planned, systematic, wide-scale and gross violation of human rights, mass murders, torture and ill-treatment, disappearances, violence against women and children (including rape and sexual slavery), forced evacuation, property destruction and implementation of a scorched-earth campaign.[97]

[91] Komnas Perempuan website: <http://www.komnasperempuan.go.id/profil/>.

[92] David Cohen, 'Accountability in the Balance: Trials Before the Special Panels for Serious Crimes in East Timor 1999–2005' (2009) 27 *Law in Context* 103, 104.

[93] Suzannah Linton, 'Unravelling the First Three Trials at Indonesia's Ad Hoc Court for Human Rights Violations in East Timor' (2004) 17(2) *Leiden Journal of International Law* 303.

[94] Cohen (n 93) 104.

[95] Art 89(3), Law 39 of 1999; KOMNAS HAM Resolutions 770/TUA/IX/99 and 797/TUA/X/99.

[96] Albert Hasibuan and others, 'Executive Summary', *Report on the Investigation of Human Rights Violations in East Timor* (Commission to Investigate Human Rights Violations in East Timor 2000) <http://www.etan.org/news/2000a/3exec.htm>.

[97] Albert Hasibuan and others, 'Conclusions and Recommendations', *Report on the Investigation of Human Rights Violations in East Timor* (Commission to Investigate Human Rights Violations in East Timor 2000) <http://www.etan.org/news/2000a/3exec.htm>.

All of these, the report stated, constituted crimes against humanity. It found evidence suggesting involvement of civil and military institutions, including the police,[98] and listed those it suspected of involvement.[99]

As mentioned, the 2000 Human Rights Court Law allowed prosecution of gross violations of human rights in ad hoc human rights tribunals. Controversially, these could convene to hear prosecutions under the 2000 Law even for crimes committed before that Law came into force, if approved by presidential decision following a recommendation from the DPR. This was required to proceed against those involved in the East Timor referendum violence, which, as mentioned, occurred in 1999. In March 2001, the DPR passed Decision 44/DPR-RI/III/2000-2001 and then-President Abdurrahman Wahid issued Presidential Decision 53 of 2001. Both instruments supported the ad hoc tribunal's establishment in the Central Jakarta District Court.[100]

Presidential Decision 53 of 2001 came under significant criticism, including from the UN, for limiting the temporal scope of the trials to violations occurring after the 30 August 1999 referendum, thus excluding serious violations identified by the KPP-HAM that occurred in April 1999, such as the massacre at the Liquica Church complex, the attack on Manuel Carrascalao's home,[101] and many other violations that occurred during Indonesia's occupation from 1975.[102] When Megawati Soekarnoputri replaced Wahid as president a few months later, she issued Presidential Decision 96 of 2001, which also limited the jurisdiction of the tribunal. It could only consider violence alleged to have occurred in April and September of 1999 and only in three locations in East Timor: Dili, Liquica, and Suai. Consequently, some of the primary cases of human rights violations identified by KPP-HAM fell outside the tribunal's jurisdiction.[103] Narrowing the jurisdiction also made it difficult for prosecutors to prove 'crimes against humanity', as this requires proving that systematic attacks against civilians were 'widespread'.[104]

As discussed, Komnas HAM does not have authority to initiate criminal proceedings against perpetrators of gross violations of human rights. Prosecutors eventually named eighteen officials, military, and militia as suspects. Table 13.3 below compares the findings of KPP-HAM with the charges brought before the ad hoc court by prosecutors:[105]

KPP-HAM had concluded that the violence was organized and systematic and involved Indonesian forces. By contrast, prosecutors, in their indictments, described the violence as being caused by rioting or conflict among pro- and anti-integration Timorese, and did not seek to demonstrate the involvement of the Indonesian military, police, or security officials in the training and arming of the East Timorese militia.[106] As Table 13.4 below shows, of the eighteen people accused of gross human rights violations, twelve were acquitted and six convicted. Eventually, however, even those convictions were overturned on appeal, resulting in no convictions.[107]

[98] The police split from the military in April 1999 in a gradual process that was formally completed in July 2000.

[99] Hasibuan and others (n 98).

[100] These legal instruments also supported the ad hoc tribunal trying the *Tanjung Priok* case, discussed later in this chapter.

[101] Victoria Coakley, 'Towards Justice and Reconciliation in East Timor' (2001) 26(5) *Alternative Law Journal* 229.

[102] Susan Harris Rimmer, *Gender and Transitional Justice: The Women of East Timor* (Routledge 2012) 59.

[103] Such as the murder of Cailaco villagers, Bobonaro District, in April 1999, and the destruction and murders in Maliana, also in Bobonaro, in September 1999: Hasibuan and others (n 98).

[104] Suparman Marzuki, *Pengadilan HAM di Indonesia: Melanggengkan Impunity* (Penerbit Erlangga 2012) 123–24.

[105] ibid 210–11.

[106] David Cohen, *Intended to Fail: The Trials before the Ad Hoc Human Rights Court in Jakarta* (International Center for Transitional Justice 2003).

[107] Marzuki (n 105) 206.

Table 13.3 Comparison of KPP findings with charges laid by prosecutors

Findings	KPP-HAM	Prosecutors
Types of crime	1. Mass murder 2. Torture and persecution 3. Sexual enslavement and rape 4. Scorched-earth campaign 5. Forced displacement 6. Destruction and removal of evidence	1. Murder 2. Torture
Cases	At least 16 primary cases	Attacks at: 1. Joao Britto Church, Liquica, 6 April 1999 2. Residence of Manuel Carrascalao, Dili, 17 April 1999 3. Residence of Bishop Carlos Belo, Dili, 6 September 1999 4. Ave Maria Church, Suai, 6 September 1999
Locations	16 counties	Dili, Liquica, Suai
Perpetrators	More than 100 perpetrators	18 perpetrators
Time of incident	January to September 1999	April 1999 and September 1999

Civil society organizations observing the trials reported concerns about prosecutorial impartiality and seriousness, and defendant supporters bringing undue pressure to bear on judges.[108] For example, a UN official interviewed by the International Center for Transitional Justice said that in 2000, prosecutors heard incriminating witness testimony from more than twenty Timorese at a floating hotel of the coast Dili. However, they did not adduce these statements or call these witnesses at trial.[109] The prosecution also did not adequately protect Timorese witnesses, and consequently some, apparently intimidated, became reluctant to testify.[110] Large numbers of uniformed military personnel attended the trial, claiming they did so as a show of solidarity with the defendants. Human rights activists, however, saw this as a display of strength designed to intimidate witnesses and judges. Cohen even describes the trials as being 'intended to fail'.[111] This is true, if one was hoping for genuine and objective attempts at giving alleged perpetrators fair trials and bringing them to justice if found guilty. Certainly, the trials succeeded in perpetuating military impunity for serious offences, and avoiding an international tribunal examining the events of 1999 in East Timor.

Tanjung Priok

On 12 September 1984, military personnel opened fire on demonstrators in Tanjung Priok, North Jakarta. The incident began when a local military official entered a Tanjung Priok mosque without removing his shoes, reportedly to confiscate material critical of the Soeharto government. Locals protested, leading to four people being arrested. Two days later, demonstrators gathered to hear a sermon rejecting the forced introduction of the

[108] ibid 130–32.
[109] ICTJ and Kontras, *Derailed: Transitional Justice in Indonesia Since the Fall of Soeharto* (International Center for Transitional Justice (ICTJ) and Kontras 2011) <http://ictj.org/sites/default/files/ICTJ-Kontras-Indonesia-Derailed-Report-2011-English_0.pdf>.
[110] Linton (n 96) 327; Cohen (n 109) 55. [111] Cohen (n 109).

Table 13.4 Verdicts in the East Timor trials

Defendant	Prosecutors demand	Verdicts			
		Ad hoc court	Appeals court	Cassation by the Supreme Court	Reconsideration (Peninjauan Kembali) by the Supreme Court
Abilio Soares	10 years	3 years	3 years	3 years	Acquittal
Timbul Silaen	10.5 years	Acquittal	Acquittal	Acquittal	-
Endar P	10 years	Acquittal	Acquittal	Acquittal	-
Eurico Guterres	10 years	10 years	5 years	10 years	Acquittal
Adam Damiri	Acquittal	3 years	Acquittal	-	-
S. Suratman	10 years	Acquittal	Acquittal	Acquittal	-
M. Noer Muis	10 years	5 years	Acquittal	Acquittal	-
Yayat Sudrajat	10 years	Acquittal	Acquittal	Acquittal	-
Hulman Gultom	10 years	3 years	Acquittal	Acquittal	-
Soedjarwo	10 years	5 years	Acquittal	Acquittal	-
Herman Sedyono	10 years	Acquittal	Acquittal	Acquittal	-
Lilik Koeshardianto	10.5 years	Acquittal	Acquittal	Acquittal	-
Gatot Subiaktoro	10 years	Acquittal	Acquittal	Acquittal	-
Syamsudin	10 years	Acquittal	Acquittal	Acquittal	-
Sugito	10.3 years	Acquittal	Acquittal	Acquittal	-
Asep Kuswani	10 years	Acquittal	Acquittal	Acquittal	-
Adios Salova	10 years	Acquittal	Acquittal	Acquittal	-
Leoneto Martins	10 years	Acquittal	Acquittal	Acquittal	-

national ideology, Pancasila, as the sole basis for all social, religious, and political organizations. They then marched to the local police station to demand the release of the four detainees. The military was waiting, and opened fire on the crowd.[112]

Komnas HAM reported that twenty-four people were killed and fifty-four others were injured. The shootings were allegedly followed by arbitrary arrests and detentions, torture, and forced disappearances of those suspected of involvement in the demonstration, including in areas beyond Jakarta, such as West Java, Lampung, and South Sulawesi.[113] In 1998, Komnas HAM established a special team to investigate the case, and then formed a Commission for Inquiry and Investigations of Human Rights Violations in Tanjung Priok (*Komisi Penyelidikan dan Pemeriksaan Pelanggaran HAM di Tanjung Priok*) (KP3T).[114]

[112] Katharine E McGregor, *History in Uniform: Military Ideology and the Construction of Indonesia's Past* (Asian Studies Association of Australia; KITLV Press 2007) 181.

[113] Wahyu Wagiman, *Final Progress Report Pengadilan HAM Tanjung Priok: Gagal Melakukan Penuntutan Yang Efektif* (Lembaga Studi dan Advokasi Masyarakat (ELSAM) 2004) 3 <http://lama.elsam.or.id/downloads/1268369271_Final_Progress_Report_Pengadilan_HAM_Tanjung_Priok.pdf>.

[114] Pusuant to Art 89(3), Law 39 of 1999; Decision of the Chairman of KOMNAS HAM 002/KOMNAS HAM/III/2000; Decision of the Chairman of KOMNAS HAM 003/KOMNAS HAM/III/2000; and Decision of the Chairman of KOMNAS HAM 012/KOMNAS HAM/VII/2000.

The Komnas HAM team found evidence of gross violations of human rights in the form of summary killings; arbitrary arrest and detention; torture, intimidation, and terror; and forced or involuntary disappearance.[115] The Commission identified twenty-three alleged perpetrators, dividing them into three categories: military personnel who allegedly committed the human rights abuses; military commanders who ordered their subordinates to commit them; and military commanders who were aware, or should have been aware, of abuses allegedly committed by their subordinates but failed to take action to prevent them.[116]

Pursuant to DPR Decision 44/DPR-RI/III/2000-2001, and Presidential Decisions 53 of 2001 and 96 of 2001, an ad hoc human rights tribunal was established at the District Court of Central Jakarta to try allegations of violations in the *Tanjung Priok* case. The KP3T report was submitted to prosecutors, who finished their own investigations in July 2003.

When the tribunal began hearing the case in September 2003, prosecutors were again criticized. While the KP3T report identified twenty-three perpetrators, prosecutors only pursued fourteen officials.[117] Contrary to KP3T recommendations, prosecutors did not indict high-level military decision-makers, such as Army General Benny Moerdani, Major General Tri Sutrisono (later Vice President under Soeharto), Brig. Gen. Soemardi, Major Darminto, Captain Auha Kusin, and Captain Mattaoini. These figures were identified in the KP3T report as having 'high command responsibility' in the *Tanjung Priok* case.

Prosecutors also did not genuinely attempt to prove that what happened at Tanjung Priok was 'widespread' and 'systematic'. These elements are central to concluding that the abuses constituted a crime against humanity. Prosecutors relied on the number of dead to prove that the incident was 'widespread', but did not mention the chain of incidents that occurred following the violence, for example the arrests and detentions that occurred outside Jakarta.

Before the trials began, several alleged perpetrators attempted to 'make peace' with witnesses and victims' families, providing some with money. Several witnesses then withdrew the statements made in the case file, and openly stated that they were doing so because of the *islah*, or reconciliation, process that they had undertaken with the perpetrators.[118] Some prosecution witnesses even testified in support of the defendants.[119]

Predictably, the Tanjung Priok trials fell well short of the hopes of human rights activists. As Table 13.5 shows, two senior military figures were acquitted, while another was sentenced to ten years' imprisonment. Eleven lower-ranking officials each received sentences of two years. All the convictions were eventually overturned on appeal.[120]

Trisakti, Semanggi I, and Semanggi II

On 12 May 1998, New Order military personnel opened fire on a demonstration at Trisakti University, Jakarta, where students were demanding political reform and Soeharto's resignation. Four students were killed and more than 600 were reportedly injured. The shootings sparked widespread rioting across Jakarta, and in other Indonesian cities, and nine days later, Soeharto was forced to resign.

The Semanggi I incident, as it has now become known, occurred in mid-November of the same year. Students and members of the public had gathered on main thoroughfares in Jakarta to protest about a special DPR session and the military's ongoing role in public life. Members of the military again opened fire on the protesters; seventeen people were killed

[115] Wagiman (n 114) 30. [116] ibid 35. [117] ibid 3–6.
[118] ELSAM, Kontras, and Indonesian Association for Legal Aid and Human Rights (PBHI), *Courts That Forgot the Victims* (2006) 4.
[119] Wagiman (n 114) 6. [120] Marzuki (n 105) 207.

Table 13.5 Verdicts in the Tanjung Priok trials

Defendant	Prosecutors demand	Verdict			
		Ad hoc court	Appeals court	Supreme Court	Reconsideration (Peninjauan Kembali) by the Supreme Court
Rudolf Adolf Butar-Butar	10 years	10 years	Acquittal	Acquittal	-
Pranowo	5 years	Acquittal	-	Acquittal	-
Sriyanto	10 years	Acquittal	-	Acquittal	-
Sutrisno Mascung	10 years	3 years	Acquittal	Acquittal	-
Asrori	10 years	2 years	Acquittal	-	-
Siswoyo	10 years	2 years	Acquittal	-	-
Abdul Halim	10 years	2 years	Acquittal	-	-
Zulfatah	10 years	2 years	Acquittal	-	-
Sumitro	10 years	2 years	Acquittal	-	-
Sofyan Hadi	10 years	2 years	Acquittal	-	-
Prayogi	10 years	2 years	Acquittal	-	-
Winarko	10 years	2 years	Acquittal	-	-
Idrus	10 years	2 years	Acquittal	-	-
Muchson	10 years	2 years	Acquittal	-	-

and more than 400 injured.[121] The Semanggi II incident began in September 1999, and was sparked by a proposed state of emergency. Once again, the military shot at protesting students, killing eleven and injuring 217.[122]

Military trials were held for the Trisakti shootings and the Semanggi II incident. In 1999, six police officers were found guilty of the Trisakti shootings and sentenced to prison terms of between two and ten months. Three years later, in January 2002, nine members of the police's Mobile Brigade received prison sentences of between three and six years for their roles in the Trisakti shootings. Military trials for the Semanggi II Incidents commenced in 2003 in Jakarta, Lampung and Palembang. Results of the Jakarta military trial remain undisclosed. Low ranking soldiers in the other locations were convicted for disciplinary offences, receiving sentences of less than one year, although whether any officers were convicted remains doubtful.[123]

Unsurprisingly, the failure of the military trials to hold senior military officials accountable did not satisfy public expectations that justice would be done, and civil society pressured the DPR to recommend that an ad hoc tribunal be established. In response, the DPR set up a Special Committee (*Pansus*) in 2001 to examine the Trisakti and Semanggi incidents and to determine whether gross violations of human rights

[121] ICTJ and Kontras (n 110).

[122] ibid. The number of victims refers to three incidents, in Jakarta (23–24 September), Lampung (28 September) and Palembang (5 October). The events in Palembang and Lampung are commonly grouped with the Jakarta as the "Semanggi II" case. See ICTJ and Kontras (n 110). See also 'Hari Ini, 17 Tahun Lalu di Kampus Trisakti' *BBC Indonesia* (12 May 2015).

[123] See ICTJ and Kontras (n 110) and Kontras, *Menerobos Jalan Buntu: Kajian terhadap system peradilan militer di Indonesia* (Kontras, 2009) <https://www.kontras.org/buku/menerobos%20jalan%20buntu.pdf>

had occurred.[124] However, rather than examining the available evidence to determine whether an ad hoc tribunal should be established, the DPR appeared intent on holding its own 'trial'.

This was highly problematic, not least because the legislature is not a court and did not follow established judicial procedures to ensure fairness. Worse, each DPR political party faction was represented on the Committee, including those representing the police and military, which then still had guaranteed positions in the legislature (a practice that was eventually prohibited). The Committee even invited military figures such as former General Wiranto to answer questions, although victims' representatives were not permitted to ask questions or cross-examine. Predictably, given its military membership, the Committee found that no gross violation of human rights had occurred in the Trisakti and Semanggi incidents and the matter should therefore be dealt with by a military tribunal instead of an ad hoc human rights court.[125]

Separately, Komnas HAM established a Commission of Inquiry into Human Rights Violations in Trisakti and Semanggi (KPP-TSS).[126] The police and military resisted this, ignoring its summonses and forcing KPP-TSS to use its authority to subpoena witnesses under Article 95 of the Human Rights Law. Military figures had argued that Komnas HAM's inquiry was illegitimate, because the DPR had already determined that no gross violations of human rights had occurred in the Trisakti and Semanggi incidents.[127]

By contrast to the DPR determinations, the KPP-TSS found indications that gross violations of human rights had occurred in the Trisakti and Semanggi incidents, consisting of indiscriminate killing, torture, rape and other sexual violence, forced or involuntary disappearance, and arbitrary appropriation of independence and other physical freedoms.[128] Komnas HAM sent these findings to prosecutors and requested that they conduct further investigations.[129] It further requested that the government act against police and military personnel who refused to cooperate with it during its inquiry.

The public prosecutor, however, returned the dossier four times to Komnas HAM during 2002, citing 'administrative technicalities'. The prosecutor later claimed that the principle of double jeopardy prevented further action, because several defendants had already been tried in the military court, and because the DPR had not recommended an ad hoc tribunal, as required under the Human Rights Court Law.[130]

[124] DPR RI Decision 29/DPR-RI/III/2000-2001; Jemma Purdey, 'Legal Responses to Violence in Post-Soeharto Indonesia' in Tim Lindsey (ed), *Indonesia: Law and Society* (2nd edn, Federation Press 2008) 523.

[125] Marzuki (n 105) 155–60.

[126] Under Art 89(3), Law 39 of 1999; KOMNAS HAM Decisions 034/KOMNAS HAM/VII/2001 and 043/KOMNAS HAM/XI/2001.

[127] 'KPP HAM Trisakti, Semanggi I dan II Akan Panggil Paksa Para Jenderal' *Hukumonline* (31 January 2002).

[128] Marzuki (n 105) 162–63.

[129] ibid 166–67.

[130] ICTJ and Kontras (n 110) 40.

14

Corruption Law

INTRODUCTION

Indonesia is notorious for having high levels of public sector corruption. In this chapter, we consider corruption within the Indonesian legal system from two viewpoints: first, how corruption cases are handled; and, second, how corruption affects the working of the system.

We begin by discussing corruption and its extent in Indonesia. We then assess key post-Soeharto anti-corruption reforms, particularly the establishment of the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi*, KPK) and the anti-corruption courts. We examine the performance of these institutions, particularly in light of the resistance they have faced when seeking to pursue politically well-connected suspects. We then focus on corruption in the Indonesian legal system, with particular emphasis on the courts and other law enforcement institutions, such as the police and public prosecution, describing the various 'entry points' for corruption in legal processes. Finally, we consider the likely future of anti-corruption reform in Indonesia.

Background

Transparency International's Corruption Perceptions Index, perhaps the most commonly cited corruption-related survey, consistently rates Indonesia as among the world's most corrupt countries.[1] Figure 14.1 indicates, however, that perceptions of Indonesia's corruption levels appear to have improved, at least from the late 2000s. As we shall see later in this chapter, this was around the time that Indonesia's Corruption Eradication Commission began successfully prosecuting higher-ranked government officials.

However, despite these improved perceptions and the notable prosecutions that appear to shape them, Indonesia's public corruption levels remain high. Indeed, while post-Soeharto anti-corruption reforms have enjoyed some success—perhaps exceeding the reasonable expectations of many commentators—there are indications that, since Soeharto's fall, overall corruption may, in fact, have increased. These indications are anecdotal and may simply demonstrate that more corruption allegations are now being pursued, particularly by the Corruption Eradication Commission, but they are widely accepted as accurate in Indonesia.

Corruption has been prevalent in government throughout most of Indonesia's modern history—including under Soekarno's 'Old Order' (*Orde Lama*) (1947–66) and even during Dutch colonialism. By most accounts, however, corruption increased significantly and became deeply entrenched in government institutions during Soeharto's reign (1966–98).[2]

Corruption has taken a wide variety of forms. Most citizens who seek a state-provided service cannot obtain it, or wait for an unreasonably long time for it, unless they engage in 'petty corruption'—that is, they pay a relatively small facilitation payment. The bribe is usually set just above the administrative costs of providing the service, thereby resembling

[1] The Index is based on the views of analysts, businesspersons, and experts about the extent of public sector corruption. See <https://www.transparency.org/research/cpi/overview>.

[2] Fiona Robertson-Snape, 'Corruption, Collusion and Nepotism in Indonesia' (1999) 20 *Third World Quarterly* 589, 592.

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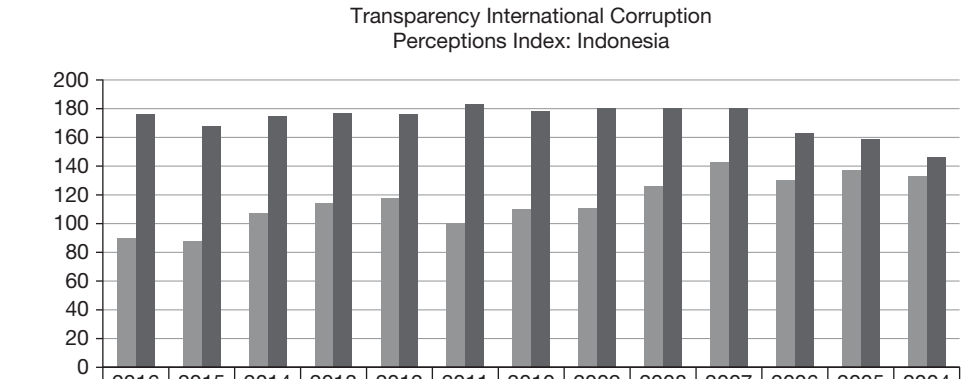

	2016	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006	2005	2004
Ranking	90	88	107	114	118	100	110	111	126	143	130	137	133
Countries	176	168	175	177	176	183	178	180	180	180	163	159	146

Figure 14.1 Indonesia rankings on Transparency International Corruption Perceptions Index (2004–16)

a fee-for-service plus reasonable return model. This is, in some ways, a partial privatization of public services. It might be justifiable (to some, at least) if, as was common during the New Order period, the budget allocated to the government agency responsible for providing the service is inadequate to cover the costs of providing that service, including the salary of its employees. However, one result of the system was that most government institutions became severely dysfunctional; their primary purposes became extracting illegal rents rather than performing the tasks for which they were established.[3]

Under Soeharto's New Order, the problem became not simply a few rogue individuals extorting money for services to which applicants were already entitled for free or at a lesser cost. McLeod describes the system that emerged as a particularly well-organized 'franchise'. It was a:

> conscious effort to generate and harvest rents from business (and, to a lesser extent, from individuals) at all levels … Just as Soeharto used his position as head of the national government to bestow privileges on selected firms ('cronies', as they have come to be known), so he effectively awarded franchises to other government officials at lower levels to act in similar manner. This included many of his ministers and senior bureaucrats, government administrators at all levels—from provinces down to rural villages—and top executives in the state enterprises and special government bodies … These franchises were not awarded free of charge, of course: as with orthodox business franchises, there had to be benefits to both franchiser and franchisee. The payback could be in a multitude of forms: payment to a Soeharto controlled *yayasan* [so-called charitable foundation]; the provision of loans and award of contracts on favourable terms to first family members and business cronies by state banks, state enterprises, and government departments; a flow of information to the top regarding individuals or organisations that might threaten the existence of the system; a willingness to act against such individuals and organisations in order to protect it; and of course clear loyalty to the head of the franchise whenever there might be a public outcry about the way the country was being governed.[4]

The workings of this system were encapsulated in the nickname given to Soeharto's wife: 'Madame Ten Percent'. A play on her name, Tien, coined by Australian journalist

[3] Adam Schwarz, *A Nation in Waiting: Indonesia's Search for Stability* (2nd edn, Westview Press 2000); Leslie Palmier, *The Control of Bureaucratic Corruption: Case Studies in Asia* (Allied Publishers Private Limited 1985).

[4] Ross McLeod, 'Soeharto Indonesia: A Better Class of Corruption' (2000) 7(2) *Agenda: A Journal of Policy Analysis and Reform* 101–02.

David Jenkins,[5] this suggested that she, or one of her family members, would demand a commission on projects approved by the New Order government. This practice made Soeharto and his inner circle very rich. He and his children amassed an estimated $US15–35 billion during his thirty-two-year rule, despite his presidential salary being only $US1,764 per month.[6]

The courts were a vital part of the New Order corruption franchise that enabled this. In fact, by the end of Soeharto's rule, they were little more than an arm of the executive, responsible for ensuring the military and the bureaucracy were together able to do virtually whatever they pleased. The courts had, in fact, become a component of something approaching a shadow system: a cronyist black state, in which business and policymaking took place, that some Indonesians mockingly called the *aspal (asli tapi palsu*: original but false) system.[7]

While corruption was deeply entrenched and widespread during the Soeharto period, it was nonetheless certainly illegal. Bribery had, for example, long been prohibited in the Criminal Code, and in 1971 a special-purpose Anti-Corruption Law was enacted.[8] Several anti-corruption taskforces were even established, with the stated aim of 'corruption eradication' (*pemberantasan korupsi*). However, they almost always acted at the behest of the regime, being primarily public relations measures to quell public discontent about corruption, and produced very few convictions.[9] Also, most of these taskforces were run by Indonesia's law enforcement institutions—the police, public prosecution, and courts—who were perceived as largely ineffective in pursuing corruption allegations. One cause of this was probably incompetence in detecting corruption, handling and preparing evidence, and proving allegations at trial, for example. After all, convictions are notoriously difficult to obtain in corruption cases, even in developed and well-resourced states. Evidence is often difficult to obtain, as perpetrators usually go to great lengths to prevent detection.[10] The primary cause, however, was almost certainly that many, if not most, law enforcers were themselves corrupt. Corruption was so endemic within the so-called 'justice system' that it became labelled the 'justice mafia' (*mafia peradilan*)—a concept we consider later in this chapter. Suffice to say here that in most cases, including corruption cases, police could be 'convinced' to drop an investigation or prosecution, lose important evidence, or charge a suspect with a lesser offence. In return for a bribe, prosecutors could drop a prosecution, present their case poorly at trial or seek a lenient penalty; and the courts could acquit or impose a shorter prison sentence than might otherwise be appropriate.[11] The result was, in essence, legal immunity for those willing to bribe their way out of trouble.

[5] David Jenkins, 'After Marcos, Now for the Suharto Billions' *Sydney Morning Herald* (10 April 1986) 1.

[6] John Colmey and David Liebhold, 'Suharto Inc: The Family Firm' (24 May 1999) BBC <http://news.bbc.co.uk/2/hi/business/3567745.stm>. Compare Elson, however, who says that Soeharto's personal wealth was probably overstated: Robert Elson, *Suharto: A Political Biography* (Cambridge University Press 2001) 281.

[7] Timothy Lindsey, 'From Soepomo to Prabowo: Law, Violence and Corruption in the Preman State' in Charles A Coppel (ed), *Violent Conflicts in Indonesia: Analysis, Representation, Resolution* (Curzon 2006).

[8] Law 3 of 1971.

[9] Andi Hamzah, *Korupsi di Indonesia: Masalah dan Pemecahannya* (Gramedia 1984); Ibrahim Assegaf, 'Legends of the Fall: An Institutional Analysis of Indonesian Law Enforcement Agencies Combating Corruption' in Timothy Lindsey and HW Dick (eds), *Corruption in Asia: Rethinking the Governance Paradigm* (Federation Press 2002); Kishali Pinto-Jayawardena, *A Consultation on Corruption and Counter-Corruption across Asia* (Asian Legal Resource Centre (ALRC) 2010).

[10] ADB and OECD, *Anti-Corruption Policies in Asia and the Pacific: Progress in Legal and Institutional Reform in 25 Countries* (Asian Development Bank 2006) 17; Benjamin B Wagner and Leslie Gielow Jacobs, 'Retooling Law Enforcement to Investigate and Prosecute Entrenched Corruption: Key Criminal Procedure Reforms for Indonesia and Other Nations' (2008) 30 *University of Pennsylvania Journal of International Economic Law* 183, 18; Zoe Pearson, 'An International Human Rights Approach to Corruption' in Peter Larmour and Nick Wolanin (eds), *Corruption and Anti-corruption* (Asia Pacific Press 2001) 39.

[11] Ali Aspandi, *Menggugat Sistem Hukum Peradilan Indonesia Yang Penuh Ketidakpastian* (Lembaga Kajia Strategis Hukum Indonesia dan Lutfansah Mediatama 2002) 33; Stewart Fenwick, 'Measuring Up? Indonesia's Anti-Corruption Commission and the New Corruption Agenda' in Timothy Lindsey (ed), *Indonesia: Law and Society* (2nd edn, Federation Press 2008) 406; Emerson Yunto, 'Mencermati Pemberian SP3 Kasus Korupsi' *Hukumonline* (25 November 2008); Assegaf (n 9) 130.

Because the justice mafia itself was an integral part of the Soeharto franchise, there was little that could be done about corruption among state institutions during the Soeharto era. Indeed, some Indonesians, donors and investors alike displayed a degree of tolerance for it. For most of Soeharto's thirty-two-year reign, the economy grew at around 7 per cent, making Indonesia one of the World Bank's eight 'High Performing Asian Economies', alongside Japan, South Korea, Taiwan, Hong Kong, and Singapore.[12] Some citizens were said to be happy with improvements to their 'lot' and saw corruption as an acceptable side-effect of economic gains. Some investors saw bribery as an efficient means to circumvent red tape and Indonesia's broadly cast and contradictory laws.[13] In this context, when corruption could be accurately calculated as a business cost, it could bring certainty for businesses in an otherwise largely uncertain system.[14]

The 1997 Asian Economic Crisis changed much of this. It hit Indonesia harder than any other country, leaving it in economic and monetary ruin the likes of which had not been seen since the Second World War.[15] The Indonesian currency dropped in value from around Rp 2,000 per $US to around Rp 20,000 at one point. Crushed under the weight of exponentially increasing loans, hundreds of Indonesian companies went bankrupt and Indonesia's foreign debt soared to US $80 billion.[16] Sharp price rises meant that most of Indonesia's then-200 million people faced poverty and one-quarter faced unemployment.[17]

In this context, corruption could no longer be seen as an innocuous or acceptable benefit of public office, part of obtaining public services, or doing business in Indonesia. Key donors, particularly the World Bank and the International Monetary Fund, attributed the economic crisis, at least in part, to high levels of corruption in government and made financial bailouts contingent upon anti-corruption reform. Domestically, the economic collapse destroyed the legitimacy of the Soeharto government and its methods. As Soeharto-era developmental gains unravelled, public resentment towards state corruption and the beneficiaries of Soeharto's corruption networks intensified.

Soeharto's fall in May 1998 presented the first real opportunity in decades to introduce genuine reforms aimed at reducing corruption in Indonesia's public institutions. Soeharto left power amid significant unrest, with secessionist threats and religious tensions mounting, massive rioting in major cities and continuing threats of further violence in the streets. His successor, Bacharuddin Jusuf Habibie, recognized that he needed to respond to calls for reform of aspects of Indonesia's political and legal systems that had become so deeply unpopular. Habibie brought forward national elections, initially due in 2002, to 1999. Most of the lawmakers thereby elected were not directly associated with the Soeharto regime.[18] Some were even noted reformists and former opposition leaders. An immediate priority was anti-corruption reform and, to that end, the new legislature enacted a new Anti-Corruption Law in 1999. Within a few years, the same legislature had also issued

[12] World Bank, *The East Asian Miracle Economic Growth and Public Policy* (Oxford University Press 1994).

[13] Stephen Sherlock, 'Combating Corruption in Indonesia? The Ombudsman and the Assets Auditing Commission' (2002) 38 *Bulletin of Indonesian Economic Studies* 367, 377.

[14] McLeod (n 4).

[15] Ross McLeod, 'Dealing with Bank System Failure: Indonesia, 1997–2003' (2004) 40 *Bulletin of Indonesian Economic Studies* 95, 95.

[16] Nadirsyah Hosen, *Human Rights, Politics and Corruption in Indonesia: A Critical Reflection on the Post Soeharto Era* (Republic of Letters 2010) 50.

[17] Jared Levinson, '"Living Dangerously": Indonesia and the Reality of the Global Economic System' (1998) 7 *Detroit Journal of International Law & Practice* 425.

[18] Denny Indrayana, *Indonesian Constitutional Reform 1999–2002: An Evaluation of Constitution-Making in Transition* (Penerbit Buku Kompas 2008) 114.

laws establishing two new institutions: the Corruption Eradication Commission and the Anti-Corruption Court. We now turn to discuss these reforms.

POST-SOEHARTO REFORMS

Anti-Corruption Law

The 1999 Anti-Corruption Law (amended in 2001)[19] replaced the 1971 Anti-Corruption Law. One of the purposes of these enactments was to make investigating and prosecuting corruption easier than under the previous statute and for most other crimes. The 1999 Law defines corruption broadly, thereby catching a wide range of behaviour, and provides severe penalties, including death (although the toughest penalty handed down at time of writing was the life term imposed on former Constitutional Court Chief Justice Akil Mochtar).

For example, any person who, with the aim of enriching him or herself, another person or a corporation, misuses his or her authority, opportunities, or means at his or her disposal, which arise because of the office he or she holds, and, by doing so, could damage the state's finances or economy, faces life imprisonment, between one and twenty years' imprisonment, and/or a fine of between Rp 50 million and Rp one billion (Art 3).[20] Public servants, state officials, and judges who receive gifts or accept promises to do, or refrain from doing, something in the course of their official duties face life imprisonment, or between four and twenty years' imprisonment, and a fine of between Rp 200 million and Rp one billion (Article 12). Bribing a judge with intent to influence a decision is also specifically prohibited, with Article 6(1)(a) imposing a penalty of between three and fifteen years' imprisonment and a fine of Rp 150 to 750 million for doing so. Public servants and others who embezzle funds also face between three and fifteen years in prison, and a fine of Rp 150 to 750 million (Article 8).

Accessories face the same punishment as those who commit the crime (Article 15).[21] Under Article 18, the Court can order the seizure of assets used to perpetrate the corrupt act, or obtained because of corruption, and can order the defendant to repay any loss the state suffered because of the corruption.

Importantly, corruption can be committed by both individuals and legal entities (Article 1(3)). If corruption is committed by or on behalf of a corporation, 'the corporation itself and/or its managers can be prosecuted and punished' (Article 20(1)). The Law also has extra-territorial effect, applying to people outside of Indonesia who provide assistance, opportunity, means or information to aid the corruption (Article 16).[22]

Article 2

Perhaps the most controversial provision of the 1999 Corruption Law is Article 2(1). Under it, corruption occurs if someone 'unlawfully enriches themselves or another person in a way that could damage the state finances or economy'. This is a very broad definition because the elucidation to Article 2(1) defines 'unlawfully' to include acts that do not breach written law, if those acts do not accord with 'justice or social values existing in the community.'

[19] Law 31 of 1999 and Law 20 of 2001 amending Law 31 of 1999.

[20] Art 5 appears to significantly overlap with Art 3. It prohibits giving or promising something to a public servant or state official so that they do or refrain from doing something in their official capacity or breach the obligations of their office. Contravening Art 5 attracts a prison sentence of between one and five years.

[21] This is a significant departure from general Indonesian criminal law, which, for most crimes, requires the reduction by one-third of sentences for those who are involved in the crime but do not commit it (Art 53, Code of Criminal Procedure (KUHAP)).

[22] To our knowledge this provision has not yet been applied to pursue corruption committed outside Indonesia.

The elucidation to Article 2(1) was, however, declared unconstitutional by the Indonesian Constitution Court in 2006.[23] One reason the Court gave was that what is 'just' or what accords with 'social values' in one part of Indonesia might differ from another, making a particular act potentially criminal in one part of Indonesia but not elsewhere.[24] According to the Court, the elucidation to Article 2(1) therefore caused legal uncertainty, which is prohibited under the Constitution. The Court struck down the elucidation to the extent that it defined 'unlawfully'.

However, the Supreme Court subsequently revived the wide interpretation of 'unlawfully'.[25] In a series of cases issued soon after the Constitutional Court's 2006 decision, the Supreme Court held that the Constitutional Court's invalidation of the elucidation to Article 2(1) had left a legal vacuum, which the Supreme Court needed to fill. It did so by using the Supreme Court's own jurisprudence on Article 2(1), which incorporated the wide reading of 'unlawfully' that the Constitutional Court had invalidated. Even though the Supreme Court has effectively subverted the Constitutional Court's decision, the Constitutional Court can do little about it, because, as discussed in Chapter 5, it lacks a power to enforce its decisions and must rely on the government to implement them. Indonesia's Supreme Court and the anti-corruption courts therefore continue to apply 'community standards' when determining whether defendants have committed 'unlawful' acts in the context of Article 2(1).

The result is that many defendants are found guilty of corruption despite not breaching any binding legal instrument. Many have been convicted after acting contrary to non-binding guidelines or simply because, in the eyes of the court, they have made a mistake that has caused loss to the state. Indeed, some have even been convicted after having showed compelling reasons for choosing not to comply with such guidelines. Worse, some government officials have been convicted of corruption, even though the prosecution did not prove that the defendant, or anyone else, obtained a benefit from that corruption. In our view, the Constitutional Court's decision was correct and should be preferred over the Supreme Court's approach.

An example of some of the perverse outcomes the Supreme Court approach has produced is the string of cases involving alleged corruption in procuring items needed to run the 2004 national elections, including ballot boxes and ink.[26] Several members of the General Elections Commission (KPU) responsible for this procurement were convicted of corruption, largely for failing to choose the cheapest tenderer, even though whether that tenderer could provide those items in time for the election was highly doubtful. Fearing that no single tenderer could deliver 'on time', the Commission decided to use several tenders and paid the average amount proposed in the tenders it had received. The case transcripts provide no evidence indicating that they personally benefitted from this.

Article 2(1) of the 1999 Corruption Law provides even more flexibility. Whether the defendant actually damages state finances or the economy is irrelevant—all that is required is that the alleged act *could* have done so.[27] Importantly, the Law specifies that returning the money does not undo the damage to the state and therefore, of itself, take the alleged act out of the definition (Article 4).

Penalties for contravening Article 2(1) include imprisonment for between four and twenty years, or for life. They also include a fine of between Rp 200 million and one billion.

[23] For an analysis of this case, see Simon Butt, '"Unlawfulness" and Corruption under Indonesian Law' (2009) 45(2) *Bulletin of Indonesian Economic Studies* 179.

[24] As discussed in Chapter 7, Indonesia has remarkable ethnic, linguistic, cultural, and religious diversity. What might be socially acceptable in one place might not be in places nearby, let alone somewhere else more distant in the archipelago.

[25] Butt (n 23). [26] These cases are discussed in ibid.

[27] Elucidation to Art 2(1).

As mentioned, Article 2(2) provides the 1999 Law with even more potency, allowing judges to impose the death penalty in 'certain circumstances'. The elucidation to Article 2(2) defines these to be, first, circumstances in which corruption affects funds allocated for recovery after a state of emergency, national natural disaster, widespread social unrest, and economic and monetary crises; and, second, for repeated crimes of corruption. At the time of writing the death penalty had never been imposed for corruption.

The KPK and its jurisdiction

The Corruption Eradication Commission (*Komisi Pemberantasan Korupsi*, KPK) was established by Law 30 of 2002 on the KPK. Headquartered in Jakarta, the KPK has, for most of its existence, had a minimal presence outside of Jakarta, primarily due to limited resources. It comprises a chairperson and five commissioners, appointed by the national legislature from a list submitted by the president. Although it reports to the president and is primarily accountable to the public, the KPK is an independent state agency.[28] Its continuing credibility relies upon this independence—particularly from police and prosecutors, who, as discussed later in this chapter, are notorious for being corrupt themselves.[29]

The KPK has various powers, two of which we discuss here. The first is a broad power to coordinate and supervise corruption investigations and prosecutions.[30] Using this power, the KPK can meet with police and prosecutors to review their performance in corruption eradication, including their handling of particular cases. More important, however, is the KPK's power to take over ongoing corruption investigations and prosecutions in specified circumstances.[31] These are where:

- the KPK receives a report or complaint about police or prosecutors failing to pursue a case or protecting the real perpetrator;
- a corruption investigation or prosecution stalls for no good reason, is marred by corruption itself, or is interfered with by the executive, legislature, or judiciary; or
- a circumstance arises that, according to police or prosecutors, makes a particular corruption case difficult to handle.[32]

Once the KPK takes over a case, the KPK Law requires police or prosecutors to give the KPK the evidence they have obtained, and any relevant documents, within fourteen days of the KPK requesting them.[33]

The KPK can also initiate its own corruption investigations and prosecutions on three grounds.[34] These are that the case:

1. allegedly involves law enforcers (that is, police, prosecutors, or judges) and state officials, or people who have conspired or collaborated with law enforcers or state officials to engage in corruption;
2. draws the attention of, and disturbs, the community; or
3. involves a loss to the state of at least Rp 1 billion.

The second ground—that the corruption case draws community attention and disturbs the community—is not further defined in the KPK Law and, in our view, is open to very broad

[28] Arts 3 and 20, KPK Law.
[29] Indeed, introductory consideration (b) of the KPK Law concedes that the government institutions that had handled corruption cases in the past had 'not yet functioned effectively and efficiently in eradicating corruption'.
[30] Arts 7–9, KPK Law. [31] Art 8, KPK Law. [32] Art 9, KPK Law.
[33] Art 8(3), KPK Law. [34] Art 11, KPK Law.

interpretation. Presumably, many types of cases fall into this category because most cases reported in the media involving public officials or public funds will draw public ire.

The KPK Law appears to leave the KPK to decide whether it will take over a case or investigate one from scratch. The KPK Law itself provides no means by which the police can challenge either decision. To the contrary, if police or prosecutors discover that they are handling the same case as the KPK, the KPK Law requires them to immediately cease their involvement in that case. Likewise, once the KPK investigates or prosecutes a corruption case, police and prosecutors automatically lose jurisdiction.[35]

Although the KPK Law gives the KPK very broad grounds upon which to initiate or take over corruption investigations, and virtually unilateral power to do so, jurisdictional clashes between the police and KPK are very common, with both claiming exclusive power to handle particular cases. In fact, as discussed below, the relationship between the police and KPK is particularly fraught, with the KPK targeting senior officers in some of its investigations and prosecutions. This has led to significant pushback from the police that continues to threaten the KPK's efficacy and perhaps even its very existence. Part of the problem appears to be that no institution, judicial or otherwise, has power to authoritatively settle these jurisdictional disputes, even though the KPK clearly trumps the police in most cases. When the KPK and police clash, it has generally been necessary for the president to intervene. However, successive presidents have done so only reluctantly and after much prevarication. This has allowed police to mete out significant reputational damage to the KPK, largely by levelling trumped-up charges against KPK commissioners.

For example, the lack of dispute resolution mechanisms was brought into sharp relief in 2012, when the KPK and police clashed over the KPK's decision to pursue high-level corruption in the police force. Both the KPK and national police claimed authority to investigate Djoko Susilo, the former chief of traffic police, over the marked-up sale of police driving simulators. When KPK investigators raided the National Police Traffic Corps headquarters in South Jakarta to obtain evidence for their investigations, police detained them and refused to release them until the following morning, claiming the police had exclusive jurisdiction over the investigation. There was public uproar about this, with many commentators presuming that the police wanted to claim jurisdiction so that they could 'guard their own', either by dropping the investigation or pursuing Susilo on much weaker charges than the KPK. Of course, as mentioned, the 2002 KPK Law clearly states that the KPK has power to handle corruption cases involving police, and that once it pursues a case, the police must stand down upon discovering that the KPK is pursuing it. After a stalemate lasting several months, during which the police and KPK were said to be running parallel investigations, then-president Susilo Bambang Yudhoyono finally recommended that the police leave the case to the KPK and cooperate fully with the investigation.[36] Eventually, in September 2013, Djoko Susilo was found guilty in the Jakarta anti-corruption court and sentenced to ten years' imprisonment. His sentence was increased to eighteen years on appeal, a term upheld by the Supreme Court in July 2014.[37]

For the most part, the KPK is, like ordinary police and prosecutors, subject to legal constraints imposed by the Code of Criminal Procedure (*Kitab Undang-undang Hukum Acara Pidana*) and the 1999 Anti-Corruption Law in relation to matters such as arrests,

[35] Art 50, KPK Law.

[36] Rabby Pramudatama and Margareth S Aritonang, 'Police Ignore SBY and Strike Back at KPK' *Jakarta Post* (6 December 2012) <http://www.thejakartapost.com/news/2012/12/06/police-ignore-sby-and-strike-back-kpk.html>.

[37] Icha Rastika, 'Putusan Berkekuatan Hukum Tetap, KPK Eksekusi Djoko Susilo' *Kompas* (8 July 2014) <http://nasional.kompas.com/read/2014/07/08/19441561/Putusan.Berkekuatan.Hukum.Tetap.KPK.Eksekusi.Djoko.Susilo>.

detentions, searches, and seizures.[38] However, the KPK enjoys several powers that other law enforcers do not. These include, without prior judicial approval:

- tapping and recording conversations;
- issuing travel bans;
- blocking accounts;
- suspending transactions and contracts;
- ordering the temporary suspension of a suspect;
- temporarily revoking permits and licenses;
- seeking financial records of suspects; and
- seizing evidence.[39]

The KPK lacks one power that ordinary police and prosecutors have—to issue cessation of investigation orders (*Surat Keputusan Penghentian Penyidikan*, SKPP). Article 40 of the KPK Law provides that once the KPK formally names a person as a suspect (*tersangka*), it cannot drop the case. This restriction was intended to prevent the KPK from ceasing investigations in questionable circumstances, as police and prosecutors had done in many previous cases. They did so most notoriously in the case against Soeharto for corruption, when they used claims that the former president's health was failing to justify dropping all charges against him.

Procedural advantages

The 1999 Anti-Corruption Law also gives investigators, prosecutors, and judges special powers to exercise in corruption cases. These include the following:

- Investigators, prosecutors, and judges can request banks to freeze accounts where corrupt money is thought to be held (Article 29(4)). While this is a frequently used interlocutory remedy in other countries, particularly in common law jurisdictions, it was virtually unknown within the Indonesian legal system before the introduction of this Law.
- If, after being validly summonsed, the defendant does not attend court for trial, he or she can be tried in absentia (Article 38(1)). This constitutes an exception to the general principle, contained in the KUHAP, that the defendant must be present for his or her trial.[40]
- The 1999 Anti-Corruption Law establishes what it calls the 'reverse burden of proof' (*pembuktian terbalik*).[41] In fact, this does not shift the burden of proof from the prosecution to prove guilt, to the defendant to prove innocence. Rather, it declares that if the defendant cannot explain the source of identified assets, judges can use this failure to strengthen suspicions that the defendant is guilty of corruption.

The 1999 Anti-Corruption Law also provides exceptions to Indonesian evidentiary rules that were often blamed for making corruption cases difficult to successfully prosecute. Courts hearing corruption cases can accept a wider range of evidence as 'valid' than courts hearing most other types of cases (Article 26A). These forms of evidence include photographs, electronic information, and video and sound recordings. The Code of Criminal Procedure (*Kitab Undang-undang Hukum Acara Pidana*, KUHAP) attributes stronger

[38] These constraints are discussed in Chapter 11.
[39] Arts 12 and 47, KPK Law.
[40] See Art 196(1), KUHAP; and Art 12(1), 2009 Law on Judicial Power (Law 48 of 2009).
[41] See General Elucidation, and Art 37, for example.

evidentiary weight to documentary evidence and witness testimony than to other types of evidence.[42] Combined with provisions allowing investigators to intercept communications suspected to relate to corruption (Article 30), enhancing the admissibility of sound recordings was critically important. This is because the KPK relies heavily on wiretapped conversations to secure convictions.

The anti-corruption court

The KPK Law also required the establishment of an anti-corruption (*Tindakan Pidana Korupsi* or Tipikor) court within the Central Jakarta District Court to perform one function: hear corruption cases that the KPK prosecutes.[43]

A panel of five judges presided over each case in this court, with a majority of them being ad hoc judges.[44] These are legal experts, such as lawyers or academics, who are hired as corruption court judges for a limited period. Ad hoc judges were joined on each panel by two career judges—that is, judges who had worked in at least one of Indonesia's general courts and had been certified by the Supreme Court for work on the Tipikor Court. The rationale for this ratio appears to have been at least twofold. On the one hand, the career judiciary was, on the whole, considered largely corrupt. Indeed, Fenwick describes the establishment of the Tipikor Court as an

> [a]ttempt to circumvent entirely a judicial system known to be complicit in protecting corruptors, and—at the very least—capable of being unresponsive or incompetent in the administration of justice.[45]

It was presumed that having a majority of ad hoc judges, who were not part of the judicial corps, would improve the likelihood of corruption cases being decided on their merits. Because career judges did not constitute a majority, the ad hoc judges would win the day if disagreement occured along career and ad hoc lines. On the other hand, many ad hoc judges lacked the judicial experience to run trials and to write judgments. It was, therefore, felt necessary to have career judges on these panels too.

Rights of appeal lay to a High Anti-corruption Court and from there to the Supreme Court, which both maintained this ratio of ad hoc to career judges. Strict deadlines for case handling were imposed. First instance courts were required to deliver their verdicts within ninety days of the trial commencing. Appeal courts had sixty days and the Supreme Court ninety days.[46]

In 2009, the national legislature, the DPR (*Dewan Perwakilan Rakyat,* People's Representative Assembly) issued Law 46 on the Tipikor Court, which required the Supreme Court to establish anti-coruption courts within the general courts located in each of Indonesia's thirty-four provincial capital cities.[47] These new corruption courts have *exclusive* jurisdiction over corruption and money laundering cases.[48] However, for reasons we discuss below, the new courts have been widely criticized for being much less effective than the Jakarta Court was on its own.

Performance of the KPK and Tipikor Court

In its first few years, the KPK appeared to proceed relatively cautiously, pursuing cases it was confident of winning but which usually involved relatively 'small fry' perpetrators,

[42] Simon Butt, *Anti-Terrorism Law and Criminal Process in Indonesia* (Policy Paper No. 1, Centre for Islamic Law and Society, The University of Melbourne 2008).
[43] Art 53, KPK Law. The Tipikor Court is regulated in Arts 53–62. [44] Art 58(2), KPK Law.
[45] Fenwick (n 11) 413. [46] Arts 58(1), 59(1), and 60(1), KPK Law.
[47] Art 3, 2009 Tipikor Court Law. [48] Art 4, 2009 Tipikor Court Law.

mainly regional officials and mid-tier civil servants. To the great frustration of anti-corruption reformists, the KPK's conservative case selection meant that it avoided taking on more notorious corruption cases, including those arising out of banking bailouts in the aftermath of the Asian Economic Crisis of 1997 and those involving Soeharto and his inner circle. However, from around the time Antasari Azhar was appointed chair in 2008, the KPK targeted higher-profile figures, including lawmakers, serving and retired ministers, and senior law enforcement officers. The KPK has maintained this general focus ever since.

The KPK's high-profile scalps have been from key government institutions, such as: the former Chief Justice of the Constitutional Court, Akil Mochtar; the former head of the General Elections Commission (KPU), Nazaruddin Sjamsuddin; the former Bank Indonesia Deputy Governor, Miranda Goeltom; and the former head of the Upstream Oil and Gas Regulatory Task Force (SKK Migas), Rudi Rubiandini. The KPK has also cut a swathe through the DPR and executive, successfully prosecuting numerous serving and retired politicians and decimating the political party established by former President Susilo Bambang Yudyohono: *Partai Demokrat* (the Democrat Party). What follows are some of the KPK's most significant cases.

- In 2009, Aulia Pohan, a former Bank Indonesia Deputy Governor, was convicted for his role in disbursing around $US10 million from the Indonesian Banking Development Foundation for improper purposes.[49] Pohan's daughter is married to Yudhoyono's oldest son. Initially, Pohan was sentenced to four years and six months for corruption, and his conviction indicated that the KPK was powerful enough to pursue even those close to the president himself. However, the lustre of the KPK's achievement was diminished when Aulia Pohan's sentence was reduced on appeal to four years, then by the Supreme Court to three years, before he was released on parole after just two years.[50]
- Senior officeholders from the Democrat Party were found guilty of corruption in the construction of the Hambalang athletes' complex (in Bogor, just outside Jakarta) and the Southeast Asian Games athletes' dormitory (in Palembang, South Sumatra). Between 2012 and 2015, they were convicted of receiving kickbacks, most in return for awarding construction contracts. These officials included: former party treasurer Muhammad Nazaruddin (who received a four-year and ten-month sentence in 2012, extended to seven years by the Supreme Court in 2013);[51] former party Deputy Secretary General Angelina Sondakh (sentenced to four and a half years in 2013, increased to twelve years by the Supreme Court later that year, then reduced to ten years on reconsideration (PK) in 2015);[52] former Sports Minister Andi Mallarangeng (who received a four-year jail sentence in 2014); and former party chairperson Anas Urbaningrum (sentenced to eight years in 2014, increased to fourteen years by the Supreme Court in 2015).[53]

[49] Harold Crouch, *Political Reform in Indonesia after Soeharto* (ISEAS 2010) 72–73.

[50] Donny Sofyan, 'Corruption Sentence Cut Reflects Failed Government' *Jakarta Post* (3 September 2010).

[51] In 2016, Nazaruddin was convicted of receiving bribes and money laundering, and another six years were added to his sentence: Abba Gabrillin, 'Divonis Untuk Dua Kasus Berbeda, Hukuman Nazaruddin Jadi 13 Tahun Penjara' *Kompas.com* (16 June 2016) <http://nasional.kompas.com/read/2016/06/16/07530431/divonis.untuk.dua.kasus.berbeda.hukuman.nazaruddin.jadi.13.tahun.penjara>.

[52] 'MA Perberat Vonis Angie' *Hukumonline* (21 November 2013) <http://www.staging.hukumonline.info/berita/baca/lt528db36e825e2/ma-perberat-vonis-angie>; 'PK Dikabulkan, Vonis Angelina Sondakh Menjadi 10 Tahun' *Kompas.com* (30 December 2015) <http://nasional.kompas.com/read/2015/12/30/18293981/PK.Dikabulkan.Vonis.Angelina.Sondakh.Menjadi.10.Tahun>.

[53] Ambaranie Nadia Kemala Movanita, 'Hukuman Anas Urbaningrum Jadi 14 Tahun, Bayar Rp 57 M, dan Hak Dipilih Dicabut' *Kompas.com* (8 June 2015) <http://nasional.kompas.com/read/2015/06/08/20072581/Hukuman.Anas.Urbaningrum.Jadi.14.Tahun.Bayar.Rp.57.M.dan.Hak.Dipilih.Dicabut>.

- Members of a DPR commission received travellers' cheques worth around Rp 24 billion as bribes, distributed by Nunun Nurbaeti, to support Miranda Goeltom's nomination as a Bank Indonesia Deputy Governor. Miranda Goeltom was herself sentenced to three years' imprisonment in 2012. Twenty-six former legislators and several others were found guilty and imprisoned for various terms for their roles in the scandal.
- Golkar legislator Zulkarnaen Djabar was sentenced to fifteen years' imprisonment in 2013 for taking kickbacks from marked-up procurements for the Religious Affairs Ministry, including Qur'ans and computer laboratories.[54] This sentence was upheld on appeal to the Jakarta High Court.[55]
- In late 2013, the former acting head of the Prosperous Justice Party (PKS), Luthfi Hasan Ishaaq, was convicted for taking kickbacks in return for issuing beef import licences. The PKS had considerable influence in the Agriculture Ministry, which had enabled it to impose quotas on imports, thereby creating significant demand for import licences. On appeal in 2014, the Supreme Court sentenced him to eighteen years' imprisonment.[56]
- Constitutional Court Chief Justice Akil Mochtar was sentenced to life imprisonment in mid-2014 for taking bribes to fix regional election dispute cases, as discussed in Chapter 5.
- Rudi Rubiandini, former head of the Upstream Oil and Gas Regulatory Task Force, was sentenced to seven years' imprisonment in 2014 for accepting bribes to fix tenders and manipulate formulae for determining the price of gas.[57] His final application to the Supreme Court was rejected in mid-2016. The KPK has pursued several others who work for the regulator for involvement in corruption.
- In early 2016, former Energy and Mineral Resources Minister Jero Wacik was sentenced to four years in prison for misusing ministerial funds to pay for personal expenses, such as family trips, his wife's birthday celebrations in a Jakarta hotel, and concert tickets for his daughter.[58] In October 2016, the Supreme Court increased his sentence to eight years following a cassation appeal by prosecutors.[59]
- Former Religious Affairs Minister Suryadharma Ali was convicted for embezzling funds from the multi-billion dollar *hajj* pilgrimage fund, which was managed by his ministry. He also misused ministerial funds and abused his position to allocate positions from the limited *hajj* pilgrimage quota to his family members and party associates.[60] In early

[54] Icha Rastika, 'Zulkarnaen Djabar Divonis 15 Tahun Penjara' *Kompas* (30 May 2013) <http://nasional.kompas.com/read/2013/05/30/20290254/Zulkarnaen.Djabar.Divonis.15.Tahun.Penjara>.

[55] Dian Maharani, 'Pengadilan Tinggi Tolak Banding Zulkarnaen Djabar dan Anaknya' *Kompas.com* (8 October 2013) <http://nasional.kompas.com/read/2013/10/08/1256019/Pengadilan.Tinggi.Tolak.Banding.Zulkarnaen.Djabar.dan.Anaknya>.

[56] 'Hak Politik Luthfi Hasan Ishaaq Dicabut, Hukumannya Diperberat Jadi 18 Tahun' *Kompas.com* (16 September 2014) <http://nasional.kompas.com/read/2014/09/16/06315561/Hak.Politik.Luthfi.Hasan.Ishaaq.Dicabut.Hukumannya.Diperberat.Jadi.18.Tahun>.

[57] Andi Saputra, 'PK Ditolak, Mantan Kepala SKK Migas Rudi Rubiandini Tetap Dibui 7 Tahun' *Detik News* (19 April 2016) <http://news.detik.com/berita/3191187/pk-ditolak-mantan-kepala-skk-migas-rudi-rubiandini-tetap-dibui-7-tahun>.

[58] 'Court Sends Jero Wacik to Four Years in Prison for Corruption' *Jakarta Post* (9 February 2016) <http://www.thejakartapost.com/news/2016/02/09/court-sends-jero-wacik-four-years-prison-corruption.html>.

[59] Andi Saputra, 'Hakim Artidjo Perberat Hukuman Jero Wacik Jadi 8 Tahun' *Detiknews* (26 October 2016) <https://news.detik.com/berita/d-3330128/hakim-artidjo-perberat-hukuman-jero-wacik-jadi-8-tahun>.

[60] Haeril Halim, 'Suryadharma Gets 6 Years for Haj Scam' *Jakarta Post* (12 January 2016) <http://www.thejakartapost.com/news/2016/01/12/suryadharma-gets-6-years-haj-scam.html>.

2016, he was sentenced to six years in prison by the Jakarta Anti-corruption Court, a sentence that was increased to ten years on appeal six months later.[61]

The KPK has continued to perform strongly during the presidency of Joko Widodo. At the time of writing, its most high-profile investigation during this period was the so-called 'e-KTP', or electronic identity card, case. The KPK alleges that all fifty-one legislators in DPR Commission II accepted kickbacks from project managers in 2010–12 in relation to the scheme, and, at time of writing, had indicted fourteen of them.[62] The KPK alleges that the case resulted in state losses of Rp 2.3 trillion, making it the largest corruption scandal ever investigated by the institution.[63] At the time of writing, former Golkar Party chair and DPR speaker Setya Novanto had been convicted of involvement in the case. Other high-profile figures alleged to have received kickbacks include: Golkar legislator Agun Gunandjar Sudarsa; Law and Human Rights Minister Yasonna Laoly; Central Java Governor Ganjar Pranowo; former Home Affairs Minister Gamawan Fauzi; and former DPR speaker Marzuki Ali. In April 2017, lawmakers launched a contentious special inquiry into the KPK. Pushback against the KPK is discussed further below.

Perhaps the most conspicuous and widely discussed aspects of the performance of the KPK and the Tipikor Courts are their prosecution and conviction rates. Before 2010, when the Supreme Court began establishing regional anti-corruption courts as required by the 2009 Anti-Corruption Court Law, the Jakarta court maintained a 100 per cent conviction rate in over 200 cases. It also tended to hand down significantly heavier sentences than the general courts.[64] Two main reasons were given to explain this. The first was that the ad hoc judges on the Court held sway, could not be 'bought', and were reluctant to acquit. The second was that KPK investigators and prosecutors were more 'professional' than their counterparts in the ordinary police force and prosecution service. In particular, they received more training in evidence handling, and prepared and presented their prosecutions with much greater rigour.

However, the Anti-Corruption Court's conviction rate ultimately brought its credibility into question, particularly among lawyers who represented defendants in cases the Court heard. A common complaint was that the Court could not have maintained this conviction rate without at some point compromising the presumption of innocence. According to them, it was simply inconceivable that the KPK could 'get it right' in every single case. Surely at least sometimes it would make mistakes or the defendant could adduce counter-evidence that led the judges to doubt whether the KPK had proved guilt to the Indonesian standard: 'convincingly and legally'.[65] After all, many of the lawyers defendants hired to represent them were among Indonesia's most highly-regarded and successful.

The two-track system and 2009 ACC Law

A related complaint was that the KPK and anti-corruption courts undermined the 'equality before the law' to which Indonesians are constitutionally entitled.[66] A two-track system

[61] 'Vonis Diperberat dan Hak Politik Dicabut, Suryadharma Ali Tak Akan Kasasi' *Hukumonline* (2 June 2016) <http://www.hukumonline.com/berita/baca/lt57503d2629d64/vonis-diperberat-dan-hak-politik-dicabut--suryadharma-ali-tak-akan-kasasi>.

[62] Ambaranie Nadia Kemala Movanita, 'Ini Daftar Mereka Yang Disebut Terima Uang Proyek E-KTP' *Kompas* (9 March 2017) <http://nasional.kompas.com/read/2017/03/09/16182831/ini.daftar.mereka.yang.disebut. terima.uang.proyek.e-ktp>; Ambaranie Nadia Kemala Movanita, '51 Anggota Komisi II DPR 2009-2014 Dapat Kucuran Dana Proyek E-KTP' *Kompas* (9 March 2017) <http://nasional.kompas.com/read/2017/03/09/14362681/51.anggota.komisi.ii.dpr.2009-2014.dapat.kucuran.dana.proyek.e-ktp>.

[63] Danang Firmanto, I Wayan Agus Purnomo, and Ahmad Faiz, 'Building the Case against KPK' *Tempo English Edition* (17–23 July 2017).

[64] ICW, *Pengadilan Umum: 'Kuburan' Pemberantasan Korupsi* (2008) <http://www.antikorupsi.org>.

[65] Art 191, KUHAP.

[66] Art 28D(1), Constitution.

had emerged for handling corruption cases. Once the KPK chose to 'charge' a person—that is, to formally name them as a suspect (*tersangka*)—that person must inevitably be prosecuted and would be convicted.[67] However, if the KPK decided not to pursue a particular case—leaving it instead for the police to investigate, ordinary prosecutors to bring to trial, and the general courts to adjudicate—the police and prosecutors could decide not to proceed and, if they did proceed, there was, statistically, an even chance of an acquittal.[68] It bears noting that, because of its relatively small size and capacity, the KPK handles only a very small proportion of corruption cases pursued in Indonesia. In the period 2004 to 2011, for example, Indonesia's general public prosecutors prosecuted almost 8,000 cases, whereas the KPK prosecuted just over 230.[69]

The 'success' of this two-track system was ultimately the very reason for that system's abolition. Within only a few years of the Jakarta Tipikor Court's establishment, several of those the Court had convicted challenged the constitutionality of various powers and procedures of the KPK and the Court.[70] Among these cases was a successful challenge to the two-track system.[71] The Constitutional Court found that by establishing the Tipikor Court to hear the KPK's prosecutions, while also continuing to allowing general courts to hear corruption cases brought by ordinary prosecutors, the KPK Law had indeed created 'dualism' that breached the constitutional principle of legal equality (Article 28D(1) of the Constitution).

However, recognizing the importance of corruption eradication, the Constitutional Court refused to invalidate the KPK Law provisions that established the Tipikor Court with immediate effect, as this would have had the effect of shutting down the Tipikor Court. Rather, the Constitutional Court gave the DPR three years to enact a new statute concerning the Tipikor Court. There was much speculation that the DPR (many of whose members were under KPK investigation) would simply allow the deadline to pass, thereby leaving the Tipikor Court with no legal basis upon which to operate. However, at its last sitting in 2009, the DPR finally enacted the new statute.

The 2009 Tipikor Court Law abolished the two-track system but it has also had profound effects—mostly negative—on the way that corruption cases are handled. In particular, the Law removed the main features of the Jakarta Tipikor Court's institutional design to which its successes were commonly attributed. First, the 2009 Law has, in effect, removed the requirement that ad hoc judges constitute a majority on each corruption court panel. Article 26(3) of the Law allows chairpersons of general courts that house Tipikor Courts to determine whether ad hoc judges will constitute majorities in corruption trials on a case by case basis. While the Supreme Court has indicated that ad hoc judges should outnumber career judges on each panel,[72] this is not always possible because of the chronic shortage of ad hoc judges, about which the Supreme Court repeatedly complains. When the Court sought to fill several dozen positions in 2013, for example, only one of forty candidates met the criteria set out in the Tipikor Court Law.[73]

Second, anti-corruption courts no longer exclusively hear prosecutions brought by the KPK. They now also hear those brought by ordinary prosecutors. Worse, the Tipikor Court Law does not even mention the KPK. Instead, it refers only to 'public prosecutors' (Article 1(4)) bringing corruption cases before the anti-corruption courts. At present, this

[67] This in turn lead to questions about the KPK's case selection methods and whether they were politically driven.

[68] ICW (n 64). [69] Simon Butt, *Corruption and Law in Indonesia* (Routledge 2012).

[70] Constitutional Court Decisions 069/PUU-II/2004 and 03/PUU-IV/2006.

[71] Constitutional Court Decision 012-016-019/PUU-IV/2006.

[72] Supreme Court Regulation 1 of 2010 on the Organisational Structure of the Registry, Composition of the Bench and Openness of the Tipikor Courts.

[73] 'MA Krisis Hakim Ad Hoc Tipikor' *Hukumonline* (30 August 2013).

is being interpreted to include the KPK, most of whose prosecutors are seconded public prosecutors in any event. However, in our view, the KPK's power to prosecute before the Tipikor Courts remains open to challenge because the 2009 Law does not specifically authorize it to do so.

Nevertheless, opening up these regional corruption courts to public prosecutors was arguably inevitable: there are simply not enough KPK prosecutors to handle the many hundreds of corruption cases proceeding through the courts each year in Indonesia.[74] Indeed, the KPK does not even have regional offices, which presumably hinders its ability to pursue cases outside Jakarta. This means that, if the success rate of the Tipikor Court was attributable to the KPK's professionalism, then this advantage appears now to have been lost.[75]

Even though allowing more career judges and general prosecutors into Indonesia's corruption courts appeared necessary to give effect to the Constitutional Court's decision, many reformists consider that these changes have had overwhelmingly negative effects. In particular, critics claim that, unlike the Jakarta Tipikor Court, these new courts have been acquitting defendants at alarming rates, citing two reasons. First, questions are raised about the integrity of even the ad hoc judges sitting in the regional courts, pointing out that several among them have already been convicted for accepting bribes to fix cases.[76] Second, some argue that public prosecutors have botched cases that the KPK would likely have won.[77] While these criticisms have merit, they are open to question too. After all, these regional courts might have acquitted defendants for good reasons, such as operation of the presumption of innocence where the prosecution has not convincingly proved its allegations.[78] In any event, the corruption courts' acquittal rate—which, according to available statistics appears to sit at around 15 per cent—is still low compared with the 50 per cent rate of the general courts before the regional courts were established. Also, judicial impropriety appears to be no worse in the regional Tipikor Courts than in most other Indonesian courts.[79]

Nevertheless, it is true to say that most corruption investigations, prosecutions, and trials in Indonesia today are now handled largely in the same way as they were before the KPK was established. They will primarily be dealt with by ordinary police, prosecutors, and judges—the very people whose influence the KPK and the Tipikor Court were established to circumvent. The main difference is that the KPK will continue to pursue a few high-profile cases and ad hoc judges will constitute a majority on some, but not all, Tipikor Court panels.

[74] Although the KPK's numbers are increasing. In the period 2009–10, the KPK had around eighty police officers and twenty-five public prosecutors: L. Baskoro, 'Farming for Corruption' *Tempo English Edition* (12 January 2009); Pinto-Jayawardena (n 9) 19; Komisi Pemberantasan Korupsi, *Laporan Tahunan KPK 2009: Perjuangan Melawan Korupsi Tak Pernah Berhenti* (KPK 2009) 84. However, by the end of 2014, the KPK had over 1,000 employees, including almost seventy-three preliminary investigators, seventy-nine investigators, and ninety-four prosecutors: KPK, *Laporan Tahunan Komisi Pemberantasan Korupsi 2014* (Komisi Pemberantasan Korupsi 2014).

[75] Even the time limits within which the various first instance and appeal trials must be completed have been relaxed. Now, first instance courts must decide cases within 120 days, high courts within sixty, and the Supreme Court (on cassation) within 120 days. The Supreme Court must decide corruption *peninjauan kembali* (reconsideration) applications within sixty days: Art 29, Tipikor Court Law.

[76] Rizky Amelia, 'KPK Detains Anti-Corruption Judge in Graft Case' *Jakarta Globe* (11 September 2013).

[77] Simon Butt, 'Anti-Corruption Reform in Indonesia: An Obituary?' (2011) 47 *Bulletin of Indonesian Economic Studies* 381.

[78] Simon Butt, 'Indonesia's Regional Anti-Corruption Courts: Should They Be Abolished?' (2012) 2(2) *Indonesia Law Review* 147.

[79] Simon Butt and Sofie Schutte, 'Assessing Judicial Performance in Indonesia: The Court for Corruption Crimes' (2014) 62(5) *Crime, Law and Social Change* 603.

Pushback

The Corruption Eradication Commission's performance has also been seriously hindered by the 'pushback' that some suspects have marshalled against it. Senior law enforcement officials and politicians have led much of this resistance.

KPK v Police

As mentioned, the KPK has exclusive jurisdiction to handle corruption cases involving law enforcement officials. However, two aspects of the KPK's initial institutional design have made the KPK susceptible to resistance and, ultimately, retribution from law enforcers—particularly police.[80] First, under Article 32(1)(c) of the KPK Law, a KPK commissioner could be dismissed if prosecuted for a 'felony' (*kejahatan*). Of course, dismissing a KPK commissioner after he or she is found guilty of a crime would not be controversial. However, Article 32(1)(c) permitted the president to permanently remove a commissioner *before* his or her trial was complete, even with no finding of guilt.

In 2009, two former KPK commissioners, Chandra Muhammad Hamzah and Bibit Samad Rianto, challenged the constitutionality of Article 32(1)(c). We discuss this Constitutional Court case in more detail below but, briefly, they argued, inter alia, that Article 32(1)(c) breached the presumption of innocence, which they claimed was a constitutional guarantee. The Constitutional Court agreed, and decided that dismissal before trial breached the presumption.[81] However, rather than invalidating the provision, the Constitutional Court declared it 'conditionally unconstitutional' (a concept discussed in Chapter 5)—that is, unconstitutional unless given the following meaning:

> KPK leaders can be dismissed permanently only after they have been found guilty of a crime by a court decision that is binding.[82]

In essence, then, a KPK commissioner now cannot legally be removed from office unless he or she has been found guilty of a crime.

The second vulnerability is contained in Article 32(2) of the KPK Law, which allows KPK commissioners to be suspended if they are 'named a suspect' in a criminal case, which, as we discuss in Chapter 11, is roughly equivalent to being 'formally charged' with an offence by police in a common law country. While this provision was apparently included in the KPK Law to protect the KPK's reputation if one of its commissioners was suspected of wrongdoing, it hands enormous power to police. Faced with a KPK investigation into one of their own, the police can, using Article 32(2), simply charge the KPK commissioner leading that investigation with an offence. This will stall the investigation and could even result in it being dropped altogether.

Article 32(2) had, at the time of writing, been used to suspend several KPK commissioners in the decade or so since the KPK was established, and to threaten several more. Police have almost always used Article 32(2) in controversial circumstances, usually amid claims that they have 'set up' commissioners. Although, formally, police should only lay

[80] The police have additional powers that they can wield against the KPK, which we do not discuss here for reasons of space. In particular, the KPK is beholden to the police for secondments. Police have, in fact, regularly refused to second investigators to the KPK and have withdrawn secondments during periods of conflict with the KPK: Butt (n 69).

[81] The Constitution does not explicitly include the presumption of innocence. However, in this case, the Constitutional Court found that the presumption is a necessary component of the rule of law (*negara hukum*), which is mentioned in the Constitution.

[82] Constitutional Court Decision 133/PUU-VII/2009, para [4.3].

such charges if they have evidence strong enough to obtain a conviction at trial, in practice, evidence presented by police against commissioners has been weak in the extreme. The strategy has nonetheless worked, because the strength of the evidence is not usually subject to scrutiny until the case is brought before a court, which would usually not happen for some months at least.

The mechanism by which KPK commissioners are suspended (under Article 32(2)) or dismissed (under Article 31(1)(c)) is the same: by presidential decision. Presumably the requirement of a presidential decision gives the president discretion to refuse to suspend or dismiss, but successive presidents do not appear to have exercised it. They have not, to our knowledge, questioned the grounds upon which commissioners were charged or prosecuted but rather appear to have simply endorsed the views of police.

Antasari, Bibit, and Chandra

Article 32(2) of the KPK Law was first applied against a KPK commissioner in March 2009, when, as mentioned, police named then-KPK Chairperson Antasari Azhar a suspect in a murder investigation. President Susilo Bambang Yudhoyono suspended Azhar after he was charged and then dismissed him when his prosecution commenced. He was ultimately convicted and sentenced to eighteen years' imprisonment for ordering the murder of a businessman who, according to the prosecution, had blackmailed him. However, his trial was highly irregular and no convincing evidence of his guilt was presented.[83]

Later in 2009, two KPK commissioners—Chandra Muhammad Hamzah and Bibit Samad Rianto—were arrested and charged on vague 'abuse of power' grounds. The police could provide no solid evidence against them but the president suspended them after the police formally named them as suspects. Ultimately, they were reinstated after a plot to frame them was revealed in wiretapped conversations between senior law enforcement officials and suspects the KPK was investigating.

Yet with Azhar gone, the KPK was run by just two commissioners until Chandra and Bibit were vindicated, neither of whom had much experience conducting investigations and prosecutions (their remit was corruption prevention and data collection). The police 'pushback' was therefore successful, at least for several months until then-president Susilo Bambang Yudyono finally intervened by appointing three temporary commissioners.[84]

Samad and Widjojanto

In late 2014, the police employed a similar retaliatory strategy. Soon after newly elected President Joko Widodo announced his intention to appoint Commander General Budi Gunawan as police chief, the KPK revealed that it was investigating Gunawan for corruption and urged Widodo not to go ahead with the appointment. The police then retaliated by charging all KPK commissioners with various offences. These charges were not supported by convincing evidence, raising speculation that police had fabricated them, as they had against Bibit and Chandra in 2009.

KPK Chairman Abraham Samad was suspended after police charged him with two offences. The first was fraud, with police alleging that he participated in falsifying an identity

[83] Butt (n 69), Chapter 5.

[84] Yudhoyono issued an interim emergency Law or Perpu, amending the KPK Law to allow him to make temporary appointments without the usual legislative processes. The temporary commissioners were: Mas Achmad Santoso (a well-known reformer, legal expert on governance issues, and senior adviser to international donors and the government); Tumpak Hatorangan Panggabean (former KPK Commissioner from 2003–07, with a long career in public prosecution); and Waluyo (previously the KPK's Deputy Commissioner for Corruption Prevention).

card. Officers identified a woman named Feriyani Lim who had a family identification card (KK) that specified Samad as the family head, even though Samad was not the head of that family. Charges were laid even though police had not established that Samad was involved in producing the card, or even that Samad knew Lim. As for the second charge, police alleged that Samad met with officials from the Democratic Party of Struggle (PDI-P) to discuss reducing charges the KPK had laid against one of its legislators. In return, the PDI-P would nominate Samad as Joko Widodo's vice-presidential running mate. While Samad admits to meeting PDI-P officials (and many other political parties), he denies that any such deals were ever struck.

Another KPK commissioner, well-respected human rights lawyer and anti-corruption activist Bambang Widjojanto, was also charged around the same time. Police allege that Widjojanto forced a witness to provide false testimony under oath in a case Widjojanto was running before the Constitutional Court in 2010. Many of the witnesses police produced to substantiate the charges subsequently withdrew their statements but the police refused to drop the case.

Because of these allegations, both Samad and Widjojanto were forced to resign and were formally suspended by the president. The mandatory retirement in 2014 of another KPK commissioner, Busyro Muqoddas, left only two commissioners, Adnan Pandu Praja and Zulkarnain, who were also investigated by the police. President Widoyo followed the path taken by President Susilo Bambang Yudoyono in 2009, installing three temporary commissioners by presidential decision.[85]

While the KPK continues to function and to pursue high-profile targets, its operations continue to be subject to the whim of senior police and prosecutors. Nevertheless, the suspension and dismissal provisions of the KPK Law may now perhaps have lost some of their potency, because of a 2015 Constitutional Court decision.[86] The Court held that suspects can now challenge a police decision to formally charge them. They can do this by bringing a pretrial (*praperadilan*) application, discussed in Chapter 11. Though the precise processes are yet to be confirmed, it appears that a general criminal court can now assess the strength of the evidence police claim to have against criminal suspects—including KPK commissioners—as a basis for charging them. Presumably, the court can order that charges be dropped if based on insufficient evidence. Of course, this Constitutional Court decision provides no real guarantees of protection to the extent that the general courts form part of the 'legal mafia' discussed later in this chapter. In other words, police may well be able to conspire with judges to ensure the failure of *praperadilan* proceedings brought by KPK commissioners.

KPK v the government

The police are not alone in having powerful leverage to use against the KPK. The national legislature, the DPR, also holds an important trump card. The KPK is a creature of statute, not a constitutional organ. This means that the DPR can remove any of the KPK's statutory powers, to which much of the KPK's potency is commonly attributed. Since 2009 in particular, various legislators have repeatedly threatened to reduce the KPK's powers, apparently in response to KPK investigations into legislators and ministers, both serving and former. Perhaps the most significant of these threats has been to remove the KPK's powers to wiretap suspects without judicial approval. The KPK claims that it relies heavily upon wiretapped conversations for evidence in corruption cases and that requiring

[85] Widodo issued a Perpu almost identical to that issued by Yudoyono, enabling him to circumvent the long DPR processes usually required to appoint commissioners. He appointed Police Inspector General (retired) Taufiqqurahman Ruki, who was the KPK's first chairperson; Johan Budi, who had long been the KPK's spokesperson; and Professor Indriyanto Seno Adji, a well-known corruption law expert from the University of Indonesia and high profile lawyer.

[86] Constitutional Court Decision 35/PUU-XIII/2015.

this approval would leave the KPK with no evidentiary advantage. In particular, given the extent of judicial corruption, discussed below, it is possible, perhaps even likely, that a judge might 'tip off' the person whose conversations the KPK sought to monitor, in return for a bribe. That person might then avoid further incriminating telephone conversations or change their method of communication, making it far more difficult for the KPK to obtain evidence against them.

The KPK is also susceptible to proposals commonly made by legislators and government officials that its investigatory or prosecutorial powers should be removed altogether. If adopted, either of these would effectively neuter the KPK, which would then be forced to rely on ordinary prosecutors to prosecute suspects based on evidence obtained by the KPK, or on ordinary police to provide evidence upon which the KPK could prosecute. In other words, the KPK's work would likely be hindered by either the police or the public prosecution, both of which are notoriously corrupt.[87] Another scenario sees the DPR stripping the KPK of *both* its investigatory and prosecutorial powers, leaving it with only corruption prevention and education roles. Of course, the national legislature could go much further than reconfiguring the KPK's powers. It could, for example, drastically reduce the KPK's budget. This would probably cripple the KPK unless alternative funds could be sourced. Ultimately, the DPR could even remove the statutory basis for the KPK's very existence. Many political parties and their members find this appealing, given the threat that the KPK poses to their rent-seeking activities.

In 2017, the KPK faced particularly intense pushback from the national legislature, which established a special committee (*panitia khusus*, Pansus) comprising members of six of the seven parties that formed the ruling coalition to conduct a formal enquiry into the KPK's handling of the e-KTP case, discussed above. Initially the committee claimed to focus on the KPK's treatment of Miryam S Haryani—also a legislator suspected of participating in the corrupt procurement scheme. The KPK appeared to rely heavily on statements she made during interrogations, which she later sought to retract. These statements had led the KPK to investigate many prominent politicians, including the then DPR Speaker, Setya Novanto, who was convicted in 2018 for his alleged role in the scandal. In response to the KPK's investigations, the legislature claimed that the KPK coerced Haryani to confess but others, including the KPK, claim legislators coerced her to retract her statement.

As tensions mounted between the DPR and the KPK, the legislative committee, pushed by Novanto, soon expanded its enquiries to include the KPK's general financial operations and management. While the DPR asserted that the purpose of this was to help improve the KPK, it seems clear that the real intention was to find additional reasons to dissolve the KPK, paralyse it by reducing its powers, or remove some of its more effective investigators.[88] The committee even visited convicts in jail who the KPK successfully prosecuted to hear complaints about the KPK's interrogation methods.[89] Few were surprised when the committee released its preliminary findings in September 2017, recommending that the KPK's operations be suspended.

For its part, the KPK claimed that, as an independent institution, it cannot be brought to heel by a legislative enquiry, and initially refused to meet with any members of the special committee. It also backed an application to the Constitutional Court by a civil society organization, the Forum for the Study of Law and the Constitution (FJHK), along with a student and lecturer, for judicial review of the legislative provisions under which the legislature sought to investigate the KPK, namely Article 79(3) of Law 17 of 2014 on the MPR,

[87] Assegaf (n 9). [88] 'A Plot to Kill KPK' *Tempo English Edition* (17–23 July 2017).

[89] 'Pansus Hak Angket KPK Gelar 'dengar Pendapat Narapidana Korupsi' di LP Sukamiskin' *BBC Indonesia* (6 July 2017) <http://www.bbc.com/indonesia/indonesia-40515493>.

DPR, DPD, and DPRD (often called the 'MD3 Law)'.[90] This gives the DPR the *hak angket*, the power to investigate the 'implementation of a statute and/or government policy, related to an issue that is important, strategic and has a wide impact on the life of the people and the nation, which is suspected to violate the law'.

On 8 February, the Court ruled that while the KPK was independent in performing its functions it was nonetheless still subject to the *hak angket* process.[91] The majority classified the KPK as part of the executive branch of government, primarily because it 'implemented legislation' in the field of law enforcement in corruption matters. One of the purposes of the *hak angket* power is to call the executive to account, so there was no basis upon which an exception could be made for the KPK.

Although this decision was a loss for the KPK, the furore surrounding the case, and the arrest of many of the politcians implicated in the e-KTP case, seemed to trigger a back-down by the DPR. In January 2018, Bambang Soesatyo replaced Novanto as DPR speaker. He said that one of his first priorities was to halt the inquiry and the special committee eventually delivered a greatly watered down list of recommendations on 14 February 2018.[92] Nevertheless, the DPR now has in the *hak angket* a formidable weapon it could deploy against the KPK in the future.

CASE STUDY: THE JUDICIAL MAFIA

While the KPK has, over the past decade, investigated and prosecuted various high-profile police officers, it has not yet turned its full attention to corruption within law enforcement institutions more generally, such as the public prosecution service and the judiciary. Certainly, the KPK has famously pursued some prosecutors and judges but it has not yet really 'scratched the surface' of the problem. Corruption became widespread in these institutions during the Soeharto period and, with some adaptation, has survived Indonesia's post-Soeharto reforms. Although the precise extent of this corruption is difficult to estimate (as we explain below), it is true to say that now (as under Soeharto) a large proportion of Indonesian police, prosecutors, and judges are 'corrupt' in the sense that they are likely to accept or request a bribe when performing their official functions.

Corrupt judges, and the corrupt court administrators, prosecutors, police, and even some lawyers who work with them, are commonly referred to collectively as the 'judicial mafia' (*mafia peradilan*) or 'legal mafia' (*mafia hukum*). As the terms imply, these officials tend to work together, including by referring opportunities for corruption to each other. Patronage networks are said to exist between lower-level and senior law enforcers, whereby subordinates channel a proportion of their illicit payments up to their superiors. Even the recruitment process for police, prosecutors, and judges is said to be tainted. Many pay large sums to be employed but then recoup their investment soon after they commence work and begin receiving bribes.[93]

It is well known too that police, prosecutors, and judges do not use corrupt funds solely to line their own pockets. A significant portion of bribes is used to supplement low government budgets for salaries and operational expenses—said to be around 30–40 per cent of required expenditure.[94]

[90] Fabian Januarius Kuwado, 'Hak Angket DPR Terhadap KPK Digugat ke MK' *Kompas* (21 July 2017) <http://nasional.kompas.com/read/2017/07/21/05150041/hak-angket-dpr-terhadap-kpk-digugat-ke-mk>.

[91] Constitutional Court Decision 36/PUU-XV/2017.

[92] Simon Butt, 'Another threat to the KPK? Constitutional Court sides with the DPR', *Indonesia at Melbourne* (20 February 2018) <http://indonesiaatmelbourne.unimelb.edu.au/another-threat-to-the-kpk-constitutional-court-sides-with-the-dpr/>.

[93] Gary Goodpaster, 'Reflections on Corruption in Indonesia' in Timothy Lindsey and HW Dick (eds), *Corruption in Asia: Rethinking the Governance Paradigm* (Federation Press 2002); ICW, *Menyingkap Tabir Mafia Peradilan (Hasil Monitoring Peradilan ICW)* (Indonesian Corruption Watch 2001).

[94] World Bank, *Combating Corruption in Indonesia: Enhancing Accountability for Development* (World Bank East Asia Poverty Reduction and Economic Management Unit 2003) 84.

Modus

Surveys conducted in 2001 by The Asia Foundation and AC Neilsen showed that the judiciary was widely regarded by Indonesians as among their nation's more corrupt institutions.[95] Bribes are said to be commonly extorted or paid to police to avoid and delay arrest, investigation, and detention; and to alter, remove, or supplement statements or evidence in the case file of the suspect or defendant.[96] Extortion is so commonplace that, according to the World Bank:

> The man on the street—especially in Indonesia's big cities, does not see the police as being there to serve and protect, but to tax and harass the public. Being flagged down by a traffic policeman is an everyday experience for most Indonesians, and one that inevitably leads to a bribe. Most people know how much is expected of them and quietly pay.[97]
>
> A common refrain from villagers [is] that reporting a stolen chicken to the police [requires] a goat's worth of bribes; reporting a goat [requires] a cow's worth of bribes.[98]

Some prosecutors allegedly seek payment in return for indicting a suspect under a lesser charge, or seeking a lesser sentence from the court.[99] To extract an illicit payment, prosecutors may even claim that the suspect's alleged act fits the definition of a more serious crime than was actually committed.[100]

Of particular concern has been prosecutors' use of pre-trial cessation of investigation orders (*Surat Perintah Perhentian Penyidikan*, or SP3).[101] Many SP3s have been issued on vague and otherwise suspect grounds in cases involving vast sums and 'big fish' (*kakap besar*), such as those involving former President Soeharto and members of his family. In these cases, it is generally suspected that there was, in fact, sufficient evidence to proceed to trial but prosecutions were dropped because of intense political pressure, an illegal payment, or both.

In 2001, respected NGO Indonesia Corruption Watch (ICW) conducted dozens of interviews with judges, lawyers, court employees, prosecutors, litigants, and police.[102] Many testified that bribery was widespread and they had witnessed or participated in it. In fact, litigants and lawyers routinely complain about judges selling favourable decisions. Some even say the judicial process resembles an auction, where the party offering the highest bribe wins.[103] However, bribery occurs at several other points in the judicial process. ICW and President Yudhoyono's own Legal Mafia Eradication Taskforce have described these 'entry points'.[104]

The first is when the case is initially registered. Some court officials seek to extort unofficial fees and offer the services of an advocate willing and able to cooperate with judges to fix the outcome of the case. The second is when the chief judge (*hakim ketua*) selects the panel of judges to preside over a given case. It is said that parties, advocates, and even brokers will

[95] Simon Butt and Tim Lindsey, 'Judicial Mafia: The Courts and State Illegality in Indonesia' in G Van Klinken and Edward Aspinall (eds), *The State and Illegality in Indonesia* (KITLV Press 2010).

[96] ICW (n 93). [97] World Bank (n 94) 84.

[98] World Bank, *Village Justice in Indonesia: Case Studies on Access to Justice, Village Democracy and Governance* (World Bank 2004) 59.

[99] Assegaf (n 9) 130. [100] Aspandi (n 11) 161; World Bank (n 98) 75.

[101] Aspandi (n 11) 33; Fenwick (n 11) 406; Yunto (n 11).

[102] Some of the interviews were later published in ICW (n 93).

[103] John Pemberton, 'Open Secrets: Excerpts from Conversations with a Javanese Lawyer, and a Comment' in Vicente Rafael and Rudolf Mrazek (eds), *Figures of Criminality in Indonesia, the Philippines, and Colonial Vietnam* (Southeast Asia Program Publications Southeast Asia Program Cornell University 1999).

[104] ICW (n 93); Satuan Tugas Pemberantasan Mafia Hukum, *Mafia Hukum: Modus Operandi, Akar Permasalahan dan Strategi Penanggulangan* (Jakarta 2010). These entry points have been confirmed by former Chief Justice Harifin A Tumpa himself: Febrina Ayu Scottiati, 'Titik-Titik Permainan Mafia Hukum di Pengadilan' *Detik.com* (22 December 2010).

often 'ask' the relevant chief judge to appoint particular judges willing to fix the case, although chief judges are said to often appoint themselves as chairpersons to so-called wet (*basah*) or high-value cases where the potential to extract large bribes to fix outcomes is higher. Third, in return for bribes, some judges appear willing to conduct trials in ways that advantage bribers and, of course, to decide cases in their favour. The Legal Mafia Eradication Taskforce report states, in our translation:

> The process that takes place just before the judges' deliberation and courtroom speech (reading out the decision) is the most vulnerable point. At this stage, litigants or their advocates, or through mediators/brokers, often try to offer a reward to the judge to decide the case in accordance with their expectations. Or a judge, either directly or through a broker, offers one party or the advocate a favourable ruling in their case in return for compensation. A more subtle means sometimes employed is the judge delaying the decision-making process as a sign for the party/defendant to contact the judge. In some cases, judges even 'auction off' the decision, awarding it to the party who pays the most. [In practice, judges even take bribes from both parties at the same time.] In minor cases or cases where the legal issues handled are very clear, the judge will generally decide the case according to existing law but will ask the winning party for 'gratitude money'[105]

Even obtaining an official copy of the decision (which is necessary for enforcement) can attract an unofficial fee. There have also been cases where decisions have been changed for corrupt purposes by judges and court officials *after* they have been read in open court.[106]

Corruption is also said to significantly affect the enforcement of judicial decisions. As mentioned in Chapter 4, enforcing a favourable decision often requires filing a separate application to the first instance court where the case was initially lodged. This procedure provides additional leverage to some judges and court officials to extort more bribes in return for enforcement, or even just to avoid delays.

Scope of the problem

It is very difficult, if not impossible, to accurately gauge the precise extent of corruption in Indonesian law enforcement institutions. It is particularly difficult in the case of the courts because whether corruption has played a part in a decision usually cannot be determined conclusively simply based on the verdict or sentence in a case. There may be reasonable legal explanations for decisions that appear to be corrupt. These may not always be obvious, and judges may not necessarily disclose them in their decisions, which are traditionally brief and often lack detailed reasoning (as we explain in Chapter 4). Likewise, prosecutorial standards in Indonesia are generally weak and prosecutors may simply fail to convincingly prove the allegations before the court. Crucial witnesses or documents may simply be unavailable. Evidence that might be portrayed in the media or elsewhere as indisputable may be brought into question at trial by judges and defence lawyers and, after examination pursuant to evidentiary rules, may be found to be of little or no weight or benefit in a formal sense. As in many other countries, the subtleties of this process rarely survive media reports or public debate.

Some Indonesian officials also seek to play down the extent of the corruption problem, pointing to the lack of hard evidence of widespread corruption and emphasizing that relatively few law enforcement officials have been prosecuted and convicted for corrupt

[105] Satuan Tugas Pemberantasan Mafia Hukum (n 104) 18.

[106] For example, Achmad Yamanie, a judge who sat on the Supreme Court panel that commuted a death sentence in a narcotics case, was later found to have changed the defendant's sentence from fifteen to twelve years *after* the decision had been finalized by the review panel: Butt, 'Judicial Responses to the Death Penalty in Indonesia' (2014) 39(2) *Alternative Law Journal* 134.

conduct.[107] Certainly, it is true that although more officials have been pursued for corruption in recent years, their numbers pale by comparison with the number of officials working in the system. For example, only a handful of Indonesia's more than 8000 judges are ever found guilty of corruption in any given year.[108]

However, these explanations are ultimately not a convincing account of how Indonesia's dysfunctional courts operate. The lack of empirical data and the relatively small number of convictions can be explained by the fact that detecting corruption is notoriously difficult. Perpetrators often cover their tracks and are usually reluctant to confess to engaging in corrupt practices. After all, when a litigant bribes a judge or a judge accepts a bribe, they both violate Indonesia's Anti-Corruption Law.[109] Furthermore, the KPK appears to have so far prioritized corruption perpetrated by politicians over law enforcers. We presume that the KPK would have obtained many further convictions if it had pursued more police, prosecutors, and judges, though this might have resulted in additional pushback in the form of arrests and prosecutions of KPK officials themselves, as discussed above.

There are undoubtedly some professional officials who are not corrupt, and some cases proceed without corruption taking place. Unfortunately, these appear to be in the minority according to the compelling admissions about the problem's existence and severity made publicly and privately to us from many quarters, including lawyers, civil society, judges, and donors. Various survey data also support similar conclusions.[110]

For example, a study commissioned by the Asian Development Bank and PwC found that the

> public perception of rampant corruption in the prosecution service has a substantial basis in fact … Those who say that the public overstates the issue (of corruption), however, are probably wrong. We consider that the evidence is overwhelming, and not subject to serious dispute. To the extent that it happens, those sworn to uphold the law break the law.[111]

The widespread existence of judicial corruption has been admitted by senior judges and even presidents, as reported in the Indonesian media. For example, the former chief justice of the Constitutional Court, Professor Jimly Asshiddiqie, has described judicial corruption as a 'big problem'.[112] Former Supreme Court Chief Justice Soerjono estimated that 50 per cent of Indonesia's judges were corrupt,[113] as did former Supreme Court Chief Justice

[107] For a list of recent convictions, see 'Criticism as Indonesia Judge Gets Just Four Years Jail For Corruption' *Jakarta Globe* (29 February 2012); 'Police, Court Officials Top List of Judicial Mafia Reports' *Jakarta Post* (31 December 2011).

[108] The Supreme Court issues annual reports that usually set out the number of judges punished, and the punishments imposed, but these are typically vague about the nature of the violation and even the identities of the errant judges.

[109] That is, Law 20 of 2001 amending Law 31 of 1999. For example, Art 6(1)(a) of this Law prohibits bribing a judge to influence a decision and imposes a penalty of between three and fifteen years for doing so. Art 12 imposes penalties upon public servants, state officials, and judges who receive gifts or accept promises to do or refrain from doing something in the course of their official duties. As mentioned, these include life imprisonment, or between four and twenty years' jail.

[110] Febri Diansyah, *Weakening of Corruption Eradication Commission (KPK) in Indonesia: Independent Report* (Indonesia Corruption Watch/National Coalition of Indonesia for Anticorruption 2009) Independent Report; Asia Foundation and ACNielsen Indonesia, *Survey Report on Citizens' Perceptions of the Indonesian Justice Sector: Preliminary Findings and Recommendations* (Asia Foundation 2001); Lilian Budianto, 'Indonesia's Judicial System Rated the Worst in Asia: Survey' *Jakarta Post* (15 September 2008) <http://www.thejakartapost.com/news/2010/10/26/bibitchandra-saga-may-take-a-new-turn.html>; Irawaty Wardany, 'Judiciary the Worst in Graft: KPK Survey' *Jakarta Post* (5 February 2009) <http://www.thejakartapost.com/news/2010/10/26/bibitchandra-saga-may-take-a-new-turn.html>; Cheta Nilawaty, 'Survei: Mahkamah Agung Paling Rawan Suap' *Tempo* (4 February 2009) 44; Ina Parlina and Margareth Aritonang, 'Judicial Graft Dents Faith in Rule of Law' *Jakarta Post* (1 June 2013).

[111] Cited in World Bank (n 94) 86. To our knowledge, this study has never been publicly released.

[112] 'Indonesia Judicial System Needs Overhaul-Court Head' *Reuters* (23 January 2008).

[113] Sebastiaan Pompe, *The Indonesian Supreme Court: A Study of Institutional Collapse* (Southeast Asia Program, Cornell University 2005), 414.

Asikin Kusumaatmadja.[114] In the mid-1990s, Adi Andojo, also a former Supreme Court Justice, publicly accused Supreme Court judges of receiving bribes from litigants. Another senior Supreme Court Justice, the late Paulus Effendi Lotulung, was reported in the *Jakarta Post* as saying: 'I myself feel quite ashamed. Corruption is everywhere, not only in the judicial bodies, but also executive bodies and even in universities'.[115] In late 2013, Supreme Court Chief Justice Hatta Ali admitted that there was a judicial mafia, stating that '[w]e must abolish all kinds of judicial mafia and improve the poor justice system. We must take action to improve ourselves'.[116] In 2006, Judicial Commission Chairperson (and subsequent KPK Deputy) Busyro Muqoddas, in a *Jakarta Post* interview, said that

> there are some corrupt judges, who trade verdicts for either money or certain positions. This is an undisputed fact and a phenomenon that has long prevailed in the country … From a sociological point of view … we can assume that judicial corruption in Indonesia has reached an alarming status. This is an emergency situation that needs extraordinary measures to tackle it.[117]

The existence of widespread judicial corruption has also been acknowledged in various World Bank reports referred to above, and even by the United Nations Special Rapporteur after visiting Indonesia in 2002. After meeting with senior law enforcement officials and legislators he concluded that

> allegations of widespread corruption are real. Though there is no doubt that there are some honest judges, the integrity of these judges is tainted by unabated and widespread judicial corruption.[118]

THE FUTURE OF ANTI-CORRUPTION REFORM IN INDONESIA

Generally speaking, the KPK has, in our view, performed very well given the very challenging political environment within which it operates. Despite constant pushback and serious threats, both institutional and personal, the KPK and its commissioners have persevered, uncovering large-scale corruption involving powerful political figures.

However, the KPK will continue to struggle uphill for at least the next decade, if it can even survive that long. The KPK was designed with Soeharto-era corruption in mind but corruption is arguably more prevalent in post-Soeharto Indonesia. As discussed in Chapter 1, the *Reformasi* era has witnessed a general dispersal of the power and discretionary authority formerly concentrated in the presidency during Soeharto's rein. While directed at establishing a democratic system and increasing government accountability, these reforms have created a fertile breeding ground for corruption.[119] Many national institutions are commonly said to have misused their new authority primarily in pursuit of financial gain. These include various ministries and, perhaps most notoriously, the national

[114] 'Courting Corruption' *Inside Indonesia* (January–March 1997).

[115] 'Corrupt Legal System Blocks Justice for All' *Jakarta Post* (7 November 1999) <http://www.thejakartapost.com/news/2010/10/26/bibitchandra-saga-may-take-a-new-turn.html>.

[116] Ina Parlina and Arya Dipa, 'MA Chief Expects High Court Leaders to Combat Judicial Mafia' *Jakarta Post* (3 December 2013); Fadhly Zikry, 'Akui Ada Mafia Peradilan, MA Ingin Berbenah' *Inilah.com* (4 December 2013).

[117] Tjarma Siboro and Dwi Atmanta, 'Justice Relies on Court's Absolute Respect for Rule of Law' *Jakarta Post* (1 February 2006).

[118] Param Cumaraswamy, *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mr. Param Cumaraswamy (E/CN.4/2003/65/Add.2)* (United Nations 2003) 18.

[119] According to Klitgaard's corruption 'formula': corruption equals monopoly plus discretion minus accountability: Robert Klitgaard, *Controlling Corruption* (University of California Press 1988).

legislature itself.[120] However, it is not only national institutions that have exploited this redistribution of power. Critics also point to a centrepiece of post-Soeharto reform—regional autonomy, under which significant political power was delegated to regional officials—as a significant contributor to increased corruption levels. Many regional officials have been criticized for exploiting their office for private gain, following the example set by Soeharto himself.[121] In 2016, for example, the KPK reported that eleven of the ninety-nine cases it investigated that year involved regional heads.[122]

If the KPK is to tackle more of Indonesia's corruption, including in regional governments, it needs to be hugely expanded. Of course, this would require a much greater budget but many lawmakers would resist this given their fear and loathing of the KPK. Expansion would also bring various risks that, if not mitigated, could undermine the KPK's credibility. For example, it might be difficult to identify a sufficiently large number of 'clean' police and prosecutors to work for the KPK; and monitoring them to ensure their integrity, particularly in regional areas, is likely to be expensive, if not nigh impossible.

Yet the KPK's main obstacle is the leverage that national legislature, police, and prosecutors still have over it. Between them, they control the KPK's powers, budget, and even composition. Until the KPK is made truly independent of these other institutions, its future—and, along with it, Indonesian anti-corruption reforms in general—is uncertain.

[120] Greg Fealy, 'Indonesian Politics in 2011: Democratic Regression and Yudhoyono's Regal Incumbency' (2011) 47(3) *Bulletin of Indonesian Economic Studies* 333.

[121] Pratikno, 'Exercising Freedom: Local Autonomy and Democracy in Indonesia, 1999–2001' in Priyambudi Sulistiyanto, Maribeth Erb, and Caroline Faucher (eds), *Regionalism in Post-Suharto Indonesia* (RoutledgeCurzon 2005); Vedi Hadiz, 'The State of Corruption: Indonesia' in World Bank, *Challenging Corruption in Asia Case Studies and a Framework for Action* (World Bank 2004); Vedi Hadiz and Richard Robison, 'Neo-Liberal Reforms and Illiberal Consolidations: The Indonesian Paradox' (2005) 41 *The Journal of Development Studies* 220.

[122] KPK, *Laporan Tahunan Komisi Pemberantasan Korupsi 2016* (Komisi Pemberantasan Korupsi 2016) 71.

PART IV

COMMERCIAL LAW

15

The Civil Code, Civil Liability, and Contract Law

INTRODUCTION

This chapter focuses on the Civil Code and key principles of Indonesian law relating to civil liability (torts), vicarious liability, agency, and contracts. We cover other aspects of private law relating to family law and inheritance in Chapter 22.

THE CIVIL CODE

Much of Indonesia's modern legal system is derived from Dutch models and Indonesia still relies heavily on statutes enacted by the Dutch during the colonial period. The Dutch Civil Code (*Burgerlijk Wetboek voor Indonesië* or *Kitab Undang-Undang Hukum Perdata*, KUHPerdata), for example, was brought into force in Indonesia in 1847 but remains the backbone of Indonesian civil law. It still governs most civil transactions and civil liability in Indonesia, even though it has been left largely unchanged since its enactment and is, therefore, badly out-of-date. The Dutch have long since replaced it in Holland.

The Civil Code is divided into four books:

- *Book One*: 'Persons', which covers 'subjects of law', legal capacity, marriage, and matrimonial assets.
- *Book Two*, which deals with goods (*barang*).
- *Book Three*, which regulates contracts (*perikatan*).
- *Book Four*, which sets out statutory limitation periods (*kedaluwarsa*) and some aspects of civil evidence law.

There is no official Indonesian-language version of the Civil Code. The original Dutch language version of the mid-nineteenth century remains the authoritative version and this creates serious difficulties. Very few Indonesians understand that language—not even lawyers or judges. While many Indonesian law schools previously taught it, few still do, and nowadays most Indonesian lawyers have little or no knowledge of the Dutch language beyond a few commonly used legal terms. They must, therefore, rely on unofficial Indonesian translations of the Code. A number of scholars have produced their own translations but there are significant differences between them. This is true even of the two most commonly used translations, produced by Kansil,[1] and Subekti and Tjitrosudibio.[2]

Some legal scholars claim that one of the reasons for this is that the Indonesian language is not particularly accommodating of complex legal terminology of the kind used in the Civil Code. Subekti, for example, acknowledges in the introduction to his translation that he had difficulty in finding Indonesian equivalents for Dutch legal terms; he even admits to needing to create terms.[3]

[1] Christine ST Kansil, *Kitab Undang-Undang Hukum Perdata* (Pradnya Paramita 2008).

[2] R Subekti and R Tjitrosudibio, *Hukum Perdata dengan Tambahan UUPA dan Undang-Undang Pokok Perkawinan* (Pradnya Paramita 2004).

[3] For example, the Dutch term *bezit* is used in the Dutch-language Civil Code. It has no exact equivalent in Indonesian. It could be translated as *milik* (ownership), *kuasa* (possession), *pegang* (hold), or *menduduki* (to sit on, occupy). In the end, Subekti chose *kedudukan berkuasa* (controlling position).

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As discussed in Chapter 4, courts in many civil law countries rely heavily on 'doctrine' that is, legal scholarship, to help interpret and apply their Codes. For Indonesia, this means that the old Dutch legal scholarship on interpretation of the Code as it stood in 1847 is a source of law. Unfortunately, while some of this has been translated, much has not, making it inaccessible to the lawyers and judges who cannot read Dutch. As Bell has convincingly shown, because few Indonesian scholars have stepped in to fill this vacuum, the Indonesian legal system has become jurisprudentially impoverished in private law.[4]

Bell also argues that because the Code is in Dutch, amendment is near-impossible, because legislators would need to enact new provisions in Dutch. We agree that using Dutch for amendments would be preferable for consistency but note that there is no legal rule preventing amendment in Indonesian, leaving the 'official version' with some provisions in Dutch and others in Indonesian. Legislators have, however, preferred to avoid directly amending the Code, choosing instead to issue new statutes that override the Code. For example, the 1960 Agrarian Law (BAL)[5] replaced many of the Code's provisions on real property, and the 1974 Marriage Law[6] replaced many Code provisions on marriage. Nevertheless, most of the Code remains intact and hence continues to be applied. Most notable, perhaps, is the law of contract, which is still governed almost exclusively by the Code.[7]

THE COMMERCIAL CODE

Indonesia's Commercial Code (*Wetboek van Koophandel voor Indonesië* or *Kitab Undang-Undang Hukum Dagang*, KUHD) is also a Dutch relic, dating from 1847. It comprises two books. The first covers general trading and the second shipping. It supplements some provisions of the Civil Code,[8] although the Civil Code prevails in the event of any inconsistency.[9] For example, the Civil Code deals with *perseroan* (companies) and *badan hukum* (legal entities) but the Commercial Code provides more detail on the *maatschap* or general partnership, the *firma* or partnership, and the *commanditaire vennotschap* or limited partnership. We discuss these entities and other business vehicles in Chapter 16.

Much of the Commercial Code has now been replaced by legislation. For example, its insolvency provisions have been replaced by other regulations, including a Dutch law in the late nineteenth century and, most recently, Law 37 of 2004 on Bankruptcy and Suspension of Debt Payments, which we consider in Chapter 19. Likewise, shipping is now covered by Law 17 of 2008 on Shipping.

CIVIL LIABILITY

As a country with a Dutch-derived civil law legal system, Indonesia relies heavily on statutes—particularly the Civil Code—to determine civil liability. Accordingly, the starting point for any discussion of non-contractual civil liability is Article 1365 of the Civil Code. It provides that:

> A person who causes loss to another person by means of an unlawful act must, because of his or her fault in causing the loss, compensate for that loss.

Article 1366 is related to Article 1365 and provides that:

[4] G Bell, 'The Importance of Private Law Doctrine in Indonesia' in Tim Lindsey (ed), *Indonesia: Law and Society* (2nd edn, Federation Press 2008) 363–81.

[5] Law 5 of 1960 on Agrarian Law, commonly referred to as the Basic Agrarian Law or 'BAL'.

[6] Law 1 of 1974 on Marriage.

[7] Bell (n 4) 366.

[8] For example, Art 1774, Civil Code states that indemnity agreements are further regulated in the Commercial Code.

[9] Art 1, Commercial Code.

> Every person is responsible, not only for loss caused by their acts, but also for loss caused by negligence or lack of care.

Together, these two provisions provide the primary legal basis for the law of civil wrongs, with Article 1365 applying to unlawful acts causing loss, and Article 1366 effectively extending the meaning of 'unlawful' act to omissions and negligence.[10]

Interpretation of Article 1365

Article 1365 claims are very commonly made in Indonesian courts and, in fact, 'dominate' their civil workload.[11] As this suggests, the provision has been widely used in different contexts as a catch-all provision to remedy many gaps in the Code. It has, for example, been used by plaintiffs to claim damages in nuisance, defamation, and land disputes.[12] Article 1365 is also often used to enable plaintiffs to claim compensation for loss caused by criminal acts, with the victim of crime using criminal conviction as proof of an unlawful act to win civil compensation from the offender.[13] Victims of crime are also entitled to compensation for civil losses under the Code of Criminal Procedure.[14]

The flexibility of Article 1365 comes from the Civil Code not defining 'unlawful' act, which has left its meaning and interpretation to doctrine and judicial practice. On a narrow interpretation, for an act to be 'unlawful', it must breach a law applicable at the time the act was performed. This interpretation prevailed before 1919, and is usually discussed in the Indonesian literature by reference to the *Singer Naaimachine* case, heard in the Dutch Supreme Court (*Hoge Raad*) in 1905. In this case, the defendant claimed to sell refurbished Singer sewing machines that were not, in fact, Singer products. The plaintiff complained that the defendant had used the Singer name without permission and argued that this was 'unlawful' within the meaning of Article 1401 of the Dutch Civil Code (the Dutch equivalent of Article 1365 of the Indonesian Code). The Court rejected the claim because the plaintiff could not establish that use of the Singer name breached a written law.[15]

Another commonly cited case in which the narrow approach was adopted is the so-called *Zutphen* case, from the city of the same name in the Netherlands. In this case—also decided before 1919—a property owner who lived above a multiple occupancy dwelling had, due to damaged pipes and failure to turn off taps, flooded the residence of the person who lived below, causing significant damage. An unlawful act claim was brought but failed because the plaintiff could not identify a statute requiring the upper floor resident to turn off the taps.[16]

Indonesian courts no longer limit themselves to this narrow interpretation. They now usually interpret 'unlawful' far more broadly, to include acts that are merely inappropriate or immoral when judged by 'community standards', even if they are not explicitly prohibited by a written law. This broad approach ultimately derives from *Lindebaum v Cohen*,

[10] Rosa Agustina, Suharnoko, and Jaap Hijma, *Hukum Perikatan* (Pustaka Larasan 2012) 6–7; Chairuddin Ismail, *Direksi dan Komisiaris dalam Perbuatan Melawan Hukum Oleh Perseroan Terbatas: Konstruksi Hukum, Tanggungjawab dan Perlindungan Hukum Pihak Ketiga* (Merlyn Press 2012) 45.

[11] Agustina, Suharnoko, and Hijma (n 10) 3; Munir Fuady, *Perbuatan Melawan Hukum: Pendekatan Kontemporer* (Citra Aditya Bakti 2002) 1.

[12] See Rosa Agustina, *Perbuatan Melawan Hukum* (Universitas Indonesia, Fakultas Hukum, Pascasarjana 2003).

[13] Fuady (n 11) 21.

[14] Art 98(1) of the Code of Criminal Procedure (*Kitab Undang-undang Hukum Acara Pidana*, KUHAP) states that if an act that forms the basis of a charge in a criminal case heard by a district court causes damage to another person, then the presiding judge, on the request of that person, can combine a compensation claim with the criminal case.

[15] Agustina, Suharnoko, and Hijma (n 10) 6–7; Ismail (n 10) 41–42.

[16] 'Perbuatan Melawan Hukum dan Wanprestasi Sebagai Dasar Gugatan' *Hukumonline* (6 September 2001); Ismail (n 10) 42.

a 1919 decision of the Dutch Supreme Court on Article 1401 of the Dutch Civil Code. According to Indonesian scholarly accounts, this case involved two competing printing companies, one owned by Cohen and the other by Lindebaum. Cohen had convinced Lindebaum's employee to provide him with a copy of Lindebaum's customer list so that he could attempt to poach them. Lindebaum sued in Amsterdam and the case went up to the Dutch Supreme Court. He succeeded, with the Court holding that Cohen's act had been inappropriate in the circumstances and that this was enough to bring the act within Article 1401.[17] *Lindebaum* was somewhat of a breakthrough case because, as mentioned, Article 1401 had previously been more narrowly interpreted to require a breach of statutory or other legal obligations.

The *Lindebaum* approach is the one that the Indonesian courts routinely rely on to interpret Article 1365 as establishing an extremely broad (and thus uncertain) ambit of civil liability. This was confirmed by the government's National Legal Development Institute (*Badan Pembangunan Hukum Nasional*) in 1993, when it sought to summarize the extremely wide reach of this provision. It stated that an unlawful act is committed if the act:

- contravenes another person's rights;
- contravenes the legal obligations of the perpetrator;
- conflicts with morality or appropriate behaviour; or
- conflicts with what is required for societal mixing with respect to people and property.[18]

Remedies for wrongful act

Damages at Indonesian law are generally compensatory, rather than punitive. An order for compensation for breach of Article 1365 would normally include losses incurred because of the wrongful act, legal costs, and interest.

The sum of damages is calculated by the court at the hearing and stated in the judgment in two parts: 'intangible' or 'immaterial' losses (pain and suffering) and 'tangible' or 'material' losses (other damages). 'Immaterial damages' are compensation for intangible personal injuries, including stress-related illnesses or conditions that are directly attributable to the wrongful act. They are largely discretionary, depending on the severity of the damage. Whether immaterial damages are available in relatively minor cases is somewhat unclear under Indonesian law but they are certainly available in serious cases. The Supreme Court has specified that these include death, serious injury, and offence.[19] In at least one case, plaintiffs have received immaterial damages for mental illness resulting from unlawful acts. In 2015, for example, the High Court of Banten awarded a plaintiff Rp 5 billion (US$ 375,600) for depression caused by a wrongful act.[20]

The amount of immaterial damages awarded is a matter for the presiding judges,[21] although it is, of course, open to the plaintiff to suggest an amount and put forward arguments to support it. The general yardstick appears to be 'appropriateness in the circumstances'.[22] Article 1371 of the Civil Code states that damages are to be assessed by reference to the

[17] Our description of this case is taken from 'Perbuatan Melawan Hukum dan Wanprestasi Sebagai Dasar Gugatan' (n 16). We have not been able to obtain a copy of the decision itself, which, to our knowledge, is not available in any reported form in Indonesia.

[18] *Naskah Akademis Peraturan Perundang-Undangan Tentang Perbuatan Melawan Hukum* (Badan Pembinaan Hukum Nasional, Kementerian Hukum dan Hak Asasi Manusia 1993) 17.

[19] Supreme Court Decision PK 650/PK/Pdt/1994.

[20] Banten High Court Decision 116/Pdt/2015/PT BTN; South Jakarta District Court Decision 248 Pdt.G/2015/PN Jkt Sel.

[21] Supreme Court Decision 601/K/Sip/1968, 23 May 1970, cited in Agustina, Suharnoko, and Hijma (n 10) 53.

[22] Agustina, Suharnoko, and Hijma (n 10); Fuady (n 11).

'position and means of the parties, and in accordance with the situation'. Where the victim suffers mental illness, the court is to consider the seriousness of the mental burden borne by the victim, the circumstances in which the illegal act occurred, and the 'situation and condition' of both the victim and the perpetrator.[23]

VICARIOUS LIABILITY

Article 1367 of the Civil Code provides that employers may be held vicariously liable for the misconduct of their employees. It states:

> (1) Every person shall be responsible for losses he or she causes, but also for losses caused by the acts of persons for whom he or she is responsible or caused by objects under his or her supervision …
>
> (3) Employers and those who appoint persons to represent their businesses are responsible for losses caused by their staff or subordinates in the course of their work or however such persons are used.

AGENCY

The Civil Code also contains several provisions dealing with the 'provision of authority' (*pemberian kuasa*) and these constitute the law of agency in Indonesia.

Under Article 1792, 'provision of authority' is defined as the 'provision of authority to another person [the agent] who receives it to do something in the name of the person who provides the authority [the principal]'. Authority to act on behalf of another person may be provided and received in various written forms (a notarial deed, a private document (*surat di bawah tangan*), a letter (*sepucuk surat*)), or orally, and may even be tacit and concluded from the exercise of the authority by the agent (Article 1793).

Law 40 of 2007 on Limited Liability Companies similarly provides that directors can give written authority to one or more employees of the company or to another person to perform a legal act in the name of the company, as outlined in a written grant of authority (*surat kuasa*) (Article 103 of the Company Law).

Authority may be granted in respect of one or more specific interests (Article 1795 of the Civil Code). It can also be granted more generally—that is, covering all interests of the principal in respect of management (Articles 1795 and 1796). However, a general grant of authority will not be sufficient to authorize the buying or selling of goods, or using goods as security for a loan, to resolve a dispute, or to perform any other act that can only be performed by the principal. For this, a specific grant of authority, using clear words, is required (Article 1796). Of course, the receiver of authority may not act on behalf of the company outside the grant of authority (Article 1797). If the receiver acts outside of this grant, then he or she will be liable for any losses. Meanwhile, a receiver acting in pursuance of a valid grant of authority binds the principal to obligations made and liabilities incurred.

CONTRACTS

As mentioned, Book III of the Civil Code is the main source of contract law in Indonesia but specific-purpose laws govern certain types of contracts. The newer Anti-Monopoly Law (5 of 1999) and Consumer Protection Law (8 of 1999) are examples of this (the relevant provisions of the latter statute are discussed later in this chapter, while the former

[23] Fuady (n 11) 258.

is discussed in Chapter 20). In some contexts, regionally-specific customary laws might also affect contract law, particularly if they are agreements within indigenous communities, although it is unusual for this sort of agreement to play a major part in commercial transactions. We discuss customary law and its position in modern Indonesia in Chapter 7.

Before turning to the elements of a contract under Indonesian law, we note that enforcing contracts is notoriously difficult in Indonesia and that it is a major obstacle to business, particularly for foreign investors. The World Bank's 2017 *Doing Business* report for Indonesia found, for example, that contract enforcement takes an average of 471 days and costs 116 per cent of the claim, usually making enforcement commercially unviable.[24] The report ranked Indonesia at just 166 out of 190 economies for ease of enforcing contracts (worse than Thailand, Cambodia, and the Philippines), although in 2018 it had inched up to 145th. A 2003 study likewise found that, while most stakeholders were reasonably satisfied with the substance of contract law, there was 'universal dissatisfaction' about its judicial application and enforcement.[25]

Elements of a contract

The elements of a contract in Indonesia are consent, capacity, certain subject, and lawful purpose (Article 1320 of the Civil Code). There is no requirement of consideration or that contracts have reciprocal benefit (Article 1314).

Consent

Indonesian law adopts the doctrine of *pacta sunt servanda*, that is, any agreement that is validly executed binds the parties as if it were a statute (Article 1338), a principle that we discuss further below. Contracts must be concluded based on the free will of the parties. A contract is valid but voidable if concluded because of mistake, duress, or deception (Article 1321).

Mistake

A contract can be voided for mistake only if the mistake is about the nature of the goods that are the subject of the contract or about the identity of one of the contracting parties, provided their identity was a main reason for the other party entering into that contract (Article 1322 of the Civil Code). This might occur, for example, where a celebrity or renowned expert is employed under the contract.

Duress

'Duress' is defined as actions that would 'give the impression to, and create fear in, a reasonable person that he or she, or his or her assets, were at imminent risk of great damage' (Article 1324). In assessing whether duress took place, consideration must be given to the age, gender, and position of the party that claims to have been under duress (Article 1324). Duress provisions do not apply where fear results from respect for parents or other family members, unless that fear is accompanied by violence (Article 1326). A contract is voidable for duress, even if caused by a third party with no direct interest in the contract (Article 1323).

[24] World Bank, *Doing Business 2017: Equal Opportunity for All* (World Bank Group 2017) 117 <http://www.doingbusiness.org/~/media/wbg/doingbusiness/documents/profiles/country/idn.pdf>.

[25] Veronica Taylor, 'Contract and Contract Enforcement in Indonesia: An Institutional Assessment' in Tim Lindsey (ed), *Indonesia: Law and Society* (2nd edn, Federation Press 2008).

Deception

A contract is voidable for deception if the deceived party would not have made the contract but for the deception (Article 1328).

Capacity

Contracts may only be concluded by legally competent parties, and a party lacking capacity can apply within five years to have the contract annulled (Articles 1331, 1454). 'Incompetent persons' include any person under official guardianship or otherwise prohibited by law from performing certain legal obligations (Article 1330). They also include 'children' but there is debate about the age at which a person ceases to be a child at Indonesian law, with several statutes establishing different ages, and marriage generally conferring capacity. Article 330 of the Civil Code, for example, defines 'child' as a person under the age of twenty-one years who is not married.[26] The Supreme Court has held, however, that the effect of Law 1 of 1974 on Marriage is that anyone who is married or is eighteen years of age or more should no longer be regarded as a child.[27] In practice, some uncertainty remains about how courts determine the age at which a person obtains legal capacity.

For completeness, we note that Article 1330 of the Civil Code also declares that married women lack capacity but since 1963, this provision has been treated as no longer applicable.[28]

Legal entities, including corporations, have capacity to contract (Article 1653).

Certain subject

Contracts must have an agreed and definite subject, whether for goods or services (see Articles 1332–34). The precise amount of goods need not be specified if ascertaining or quantifying them is possible at a later stage (Article 1333).

Lawful purpose and illegal contracts

Contracts must have a legal purpose. Illegal purposes are those defined as such by statute or that violate public order and morality (Article 1337). Clauses that contravene morals or are prohibited by law are invalid, and agreements relying on them are void (Article 1254).

Illegal anti-competitive contracts

Law 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Competition makes various types of anti-competitive contracts illegal. This Law also provides for the establishment of the Business Competition Supervision Commission (*Komisi Pengawas Persaingan Usaha*, KPPU). It has the power to examine contracts that may lead to monopolistic practices or unhealthy competition (Article 35) and can investigate alleged violations of the Law. It can annul such contracts, order compensation, and issue fines, where appropriate

[26] See, for example, 'Perbedaan Batasan Usia Cakap Hukum dalam Peraturan Perundang-Undangan' *Hukumonline* (12 February 2016). Other legislation defines children as anyone under eighteen years old. These include Law 1 of 1974 on Marriage; Law 13 of 2003 on Labour; Law 3 of 1997 on Child Justice; Law 39 of 1999 on Human Rights; Law 23 of 2002 on Child Protection; Law 12 of 2006 on Pornography; Law 12 of 2006 on Indonesian Citizenship; and Law 21 of 2007 on the Eradication of People Smuggling.

[27] Supreme Court Decision 477/K/Sip/76.

[28] Supreme Court Circular Letter 3 of 1963. For discussion, see Daniel Lev, 'The Lady and the Banyan Tree: Civil-Law Change in Indonesia' (1965) 14 *The American Journal of Comparative Law* 282, 303.

(Article 47(2)). As mentioned, we cover competition law and the KPPU in more detail in Chapter 20.

Applicable law

As discussed above, Article 1338 of the Civil Code embodies the concept of freedom of contract and provides that any agreement that is validly executed binds the parties as if it were a statute. This allows parties to choose a governing law for their contracts, which might be a law other than Indonesian. Indonesian courts do not usually impose Indonesian law if contracting parties agree to use foreign law as their law of choice in a contract. Rather, they generally respect the choice of a governing law in the contract, but then refuse to hear the case because they lack jurisdiction.

Law 30 of 1999 on Arbitration and Alternative Dispute Resolution also grants parties the right to choose the applicable law for disputes. If the parties nominate no such law, but agree where to arbitrate, then the law of the place of arbitration will apply to their dispute (elucidation to Article 56(2)).

Form

Most contacts require no particular form to be binding. However, some contracts must be in writing or take the form of a formal deed (*akta notaris*). These requirements are set out in the Civil Code and other laws relating to specific transactions or issues. Examples of contracts that must be in writing include:

- dispute resolution agreements (Article 1(1) and (3) of Law 30 of 1999 on Arbitration and Alternative Dispute Resolution);
- certain debt agreements (Article 613 of the Civil Code);
- insurance agreements (Article 255 of the Commercial Code);
- certain employment agreements (Article 57 of Law 13 of 2003 on Labour); and
- rental agreements (Article 12 of Law 4 of 1992 on Housing and Settlements).

Contracts in writing that must be in the form of a notarial deed include:

- certain dispute resolution agreements (for example, to settle disputes by arbitration, or if parties cannot sign in person: Article 9(2) of Law 30 of 1999);
- certain corporate transactions (for example, changes to company articles of association: Article 21 of Law 40 of 2007 on Limited Liability Companies; deeds of mergers and acquisitions: Article 128 of Law 40 of 2007);
- marriages (Article 147 of the Civil Code) and marriage-related agreements (such as pre-nuptial agreements, donations, or gifts to fiancés prior to marriage: Article 176 of the Civil Code);
- real estate transactions (including land purchase and transfer agreements: Article 16 of Law 4 of 1992 on Housing and Residential Areas);
- mortgage certificates (Law 4 of 1996 on Mortgages on Land and Land-Related Objects); and
- fiduciary security agreements (Article 5 of Law 42 of 1999 on Fiduciary Securities).[29]

[29] A fiduciary security is a security right over moveable tangible or intangible property, or over immoveable property that cannot be subject to a mortgage, by which the fiduciary grantor retains the property transferred that is being used as a security to pay the loan and provides the fiduciary grantee with a priority right over other creditors. See generally, Law 42 of 1999 on Fiduciary Securities.

Some real estate contracts must take the form of a deed prepared by a land conveyance official (Government Regulation 37 of 1998 on Land Conveyance Officials).

In litigation, the evidentiary weight of particular contracts can vary, depending on their form. For example, if a dispute emerges about which of two versions of a contract is the 'true' agreement, a court will usually prefer an agreement embodied in a notarial deed. This is discussed further in Chapter 6.

Language requirements

Article 31(1) of Law 24 of 2009 on the National Flag, Language, Symbols and Anthem requires that Indonesian be used for contracts with Indonesian government institutions, private institutions or citizens. Law 30 of 2004 on Notaries applies the same requirement to notarial deeds (Article 43(1)). Chapter 6 covers these requirements in more detail.

Offer and acceptance

Offer and acceptance is not explicitly mentioned in Indonesian law, although offer and acceptance can demonstrate that 'the intentions of the parties coincide' (the first element of a contract in Article 1320 of the Civil Code).[30] In practice, therefore, a contract comes into existence when offer and acceptance has occurred, that is, where one or more parties bind themselves to fulfil an obligation to another party. The exchange of offer and acceptance may be explicit or tacit. An offer is valid until the period for acceptance expires; if no time is stated, the offer lapses after a 'reasonable' period. An offer cannot be revoked unless the power to revoke it has been reserved.[31]

Performance and interpretation

Good faith, custom, and 'reasonableness'

Contracts must be performed in good faith (Article 1338 of the Civil Code). Parties are bound not just by what is stipulated in the contract but also by reasonableness, custom, and statute (Article 1339).[32] Article 1347 supports this, providing that customary provisions shall be deemed to be implied in the agreement, even when not specifically mentioned. If the parties wish to exclude the operation of these customary practices, they must do so expressly.

One effect of these provisions is that reasonableness, customs, and statute may be used as aids in interpreting a contract, and this sometimes allows judges to deviate from the letter of the contract if that is necessary to ensure good faith. The standard of reasonableness is only invoked, however, in the absence of a statutory provision or custom that would otherwise resolve the issue.[33]

Severability

Contractual obligations are generally not severable. Parties who wish to avoid the whole contract being rendered void because of a contravening provision should include an explicit severability clause. Article 10(h) of Law 30 of 1999 on Arbitration recognizes severability of contracts containing arbitration clauses: if the main contract is concluded or voided, then the arbitration clause can still apply to require the parties to resolve their disputes by arbitration.

[30] Sudargo Gautama and Robert Hornick, *An Introduction to Indonesian Law: Unity in Diversity* (Alumni Press 1974) 130.
[31] ibid. [32] ibid 132. [33] ibid.

Sub-contracting

Where one party has an interest in a construction or production contract being performed directly by the other, a third party may not perform it without the consent of both parties (Article 1383 of the Civil Code). Other sub-contracting rules are discussed in Chapter 17.

Specific performance

If one party has not met its obligations under a contract, the other party can seek specific performance if the breaching party can still perform the obligations and it is reasonable for that party to do so (Article 1267 of the Civil Code).

Termination

The Civil Code contains ten grounds for contract termination (Article 1381). These are:

- performance (Articles 1382–1403);
- offer to pay, followed by depositing into court (Articles 1404–12);
- novation (Articles 1413–24);
- compensation (or debt set-off) (Articles 1425–35);
- debt mixture (confusion or merger) (Articles 1436–37);
- debt release (Articles 1438–43);
- termination or cancellation (Articles 1446–56);
- satisfaction of a condition for cancellation (although this generally requires court order). See also Articles 1253, 1265–67;
- operation of the statute of limitations (generally thirty years, according to Article 1967. See also Articles 1946–62, 1967–93).

Destruction of subject matter

If the subject matter of the contract is destroyed and cannot be traded, the contract is terminated, provided the object's destruction was not the debtor's fault (Article 1444). Any compensation rights of the debtor must be transferred to the creditor (Article 1445).

Default

If a contract has not been performed, a party can seek enforcement of the contract by the other party (if this is still possible) or termination of the contract with compensation for loss and interest owed (Article 1267).

In most cases, however, failure to fulfil a contractual obligation does not automatically create a legal breach or default. If the contract does not mention breach as a condition for termination or rescission, the non-breaching party must serve the breaching party with a summons (*surat somasi*), issued by the clerk of a district court, or a registered letter that he or she prepares, demanding that the obligation be performed. If the obligation is not fulfilled within the time frame stipulated, a legal default then occurs (Article 1266).

In some cases, the courts have been willing to dispense with the summons requirement, if the creditor can prove that the debtor had been adequately notified of the failure to perform. If the contract stipulates a deadline for performance, or a deadline implicitly applies due to the nature of the contract, then termination can occur without a demand if the deadline is not met (Article 1243). There are also some circumstances in which unilateral termination and rescission are possible without a court order. For example, a seller may reclaim goods already delivered to the buyer if the buyer has not paid within thirty days of the sale, provided the buyer still has the goods (Article 1145).

In practice, lawyers often draft contracts that seek to waive the operation of Articles 1266 and 1267 to allow for unilateral termination in specified circumstances and avoid the need for a summons. These waivers are not specifically regulated and their legal status is uncertain.[34]

Rescission

Rescission occurs where the contract is terminated and each party is restored to their respective pre-contractual position. Rescission can occur upon fulfilment of a condition of rescission written into the contract (Article 1265). Even if one of these conditions is fulfilled, rescission is not automatic and must be judicially approved (Article 1266). If a contract does not include conditions for rescission, the court can consider the overall circumstances and can, on request, set a deadline for obligations to be fulfilled not exceeding one month (Article 1266).

Damages

The Civil Code provides for three main types of remedies for breach of contract. A plaintiff can seek: damages; specific performance, to force a party to a contract to meet the terms of a contract; or a declaration that the defendant's act was unlawful (see Articles 1243–48, 1267).

Compensation must be paid if the debtor has been found to have not performed his or her obligations and continues not to perform them (Article 1243). They must also be paid if a deadline has passed for delivery or performance (Article 1243). Compensation includes *biaya (kosten*) or expenditure, that is expenses and costs incurred; *rugi (schaden)* losses, that is, 'injury to property' in a broad sense; and *bunga (interessen*) literally, interest, but here meaning loss of profits (Article 1246). Compensation cannot exceed losses directly caused by failure to fulfil the contract (Articles 1247–48).

Force majeure

A debtor may avoid liability if he or she can demonstrate that non-performance within the contractual deadline was caused by something unforeseeable for which he or she was not responsible, provided the debtor has not acted in bad faith (Articles 1244 and 1245).

Limitation of actions

Applications for termination of a contract must take place within five years of non-performance unless more specific legislation applies (Article 1454).

Actions alleging duress, deception, or mistake must be brought within five years of the injured party learning of the deception or mistake, or five years of the injured party ceasing to be under duress (Article 1454). See also Articles 1946–62 and 1967–93.

Specific types of contracts

As mentioned, some types of contracts are governed by rules found outside the Civil Code. We now discuss three examples of these: contracts for consumer goods and services, and e-commerce and construction contracts.

[34] Kartini Muljadi and Gunawan Widjaja, *Perikatan Pada Umumnya* (RajaGrafindo Persada 2003).

Contracts for consumer goods and services

Law 8 of 1999 on Consumer Protection sets out rights and responsibilities of both consumers and businesses dealing in consumer goods or services. It establishes various consumer rights, including to: safe goods or services (Article 4(a)); honest, clear, and correct information regarding the condition of goods or services (Article 4(c)); and compensation or exchange if the goods or services received differ from those agreed to or are of unacceptable quality (Article 4(h)). The Law also sets out a series of consumer obligations in Article 5.

Under this Law, traders are prohibited from offering goods or services that do not meet regulatory standards (Article 8(1)(a)) or are not in accordance with the stipulated quantity/weight or the conditions, guarantees, or other specifications set out on the label or in explanations of the good or service provided (Article 8(1)). Article 9(1) prohibits false advertising; and Article 10 prohibits false or misleading offerings, promotions or advertisements in relation to:

(a) the price or rate of a good or service;
(b) the use of a good or service;
(c) a condition, guarantee, or right for compensation attached to a good or service;
(d) a price cut or gift on offer; and
(e) dangers associated with the use of the good or service.

Article 13(2) proscribes the use of promotional prices in advertising related to medicine, including traditional medicine, supplements, and other health services. Article 15 prohibits traders from using physical force or psychological coercion in offering their goods or services. Article 17 prohibits advertising that:

(a) deceives consumers about the quality, quantity, materials, use, or price/tariff and time frame for delivery of a good or service;
(b) deceives consumers about a guarantee;
(c) contains information that is misleading, false, or inaccurate;
(d) does not include information about the risks associated with the good or service;
(e) exploits someone's position or person without authority or permission of the parties involved; and
(f) violates ethics and advertising regulations.

Article 18 prohibits standard clauses that seek to limit certain consumer rights or shift responsibility from the trader.

Compensation, refunds, and exchanges

Article 19 requires traders to take responsibility and provide compensation for destruction, pollution, and or other consumer losses from consuming the goods or services they have produced. Compensation may be by refund or exchange of goods and services, or medical treatment or other compensation (Article 19(2)). Compensation must be provided within seven days of the transaction (Article 19(3)). These provisions do not apply where the consumer, and not the trader, is at fault (Article 19(5)). Importantly, the burden of proof to show that the trader is not at fault rests with the trader (Article 28). Under Article 23, traders who refuse or ignore requests for compensation may be taken to a consumer dispute resolution body or the court with jurisdiction over the region where the consumer resides.

A trader who sells wares through another trader remains liable to pay compensation if: the second trader sells the goods to consumers without making any modifications to the good or service; and the second trader is not aware that there is a difference between the product or service offered and the sample's quality and its composition (Article 24(1)).

National Consumer Protection Agency

The legislation also establishes a National Consumer Protection Agency (*Badan Perlindungan Konsumen Nasional*, BPKN) that can provide recommendations to the government about consumer protection and receive complaints from consumers, consumer protection NGOs, and traders. According to the Indonesian Consumer Protection Foundation (*Yayasan Lembaga Konsumen Indonesia*, YLKI), an NGO, rates of official consumer complaints in Indonesia remain low.[35] About one-third of complaints received in 2015 related to the financial services and housing sector, about which there is frequent consumer protection litigation.[36]

Actions in relation to trader misconduct may be commenced by a single consumer who has suffered loss, a group of consumers, a consumer protection NGO, the government, or a government agency (Article 46(1)).

Dispute resolution

The Consumer Protection Law provides a framework for Consumer Dispute Resolution Bodies (*Badan Penyelesaian Sengketa Konsumen*, BPSK) at the regional level (Articles 49–58). Among other tasks, these bodies are to handle and resolve consumer disputes by mediation, arbitration, or conciliation (Article 52). In mid-2017, according to Ministry of Trade data, BPSK had been established in 190 of Indonesia's more than 500 counties (*kabupaten*) and cities, although we note that in 2015, the government reported that only seventy-eight of the 166 BPSK then established were operational.[37]

Sanctions

Consumer dispute resolution bodies may issue administrative sanctions for violations of Articles 19(2), (3), 20, 25, and 26 of up to Rp 200 million. Violations of Articles 8, 9, 10, 13(2), 15, 17(1)(a), (b), (c), (e), 17(2), and 18 are punished with up to five years' imprisonment or a fine of Rp 2 billion. Anyone who breaches Articles 11, 12, 13(1), 14, 16, and 17(1)(d), (f) faces two years in prison or a fine of Rp 500 million. These businesses may be also required to: destroy certain goods; publicly announce the judgment; pay compensation; cease activities that result in losses to consumers; take goods out of circulation; or surrender their licences to operate (Article 63).[38]

[35] I Wayan Agus Purnomo, 'Budaya Komplain Konsumen Indonesia Dinilai Rendah' *Tempo* (6 May 2012) <https://bisnis.tempo.co/read/news/2012/05/06/092401996/budaya-komplain-konsumen-indonesia-dinilai-rendah>; Bahri Kurniawati, 'YLKI: Complain Habbit Konsumen Indonesia Masih Rendah' *Tribunnews.com* (15 March 2012) <http://www.tribunnews.com/nasional/2012/03/15/ylki-complain-habbit-konsumen-indonesia-masih-rendah>; Safyra Primadhyta, 'Pengaduan Rendah, Iklim Perlindungan Konsumen Belum Kondusif' *CNN Indonesia* (12 March 2015) <https://www.cnnindonesia.com/ekonomi/20150312100812-92-38589/pengaduan-rendah-iklim-perlindungan-konsumen-belum-kondusif/>.

[36] See YLKI website: <http://ylki.or.id/2016/06/konsumen-dan-keberanian-mengadu-2/>.

[37] <http://siswaspk.kemendag.go.id/daftarbpsk>; 'Perlindungan Konsumen: Pemerintah Targetkan 200 BPSK Pada 2019' *Bisnis Indonesia* (13 May 2015) <http://industri.bisnis.com/read/20150513/12/432909/perlindungan-konsumen-pemerintah-targetkan-200-bpsk-pada-2019>.

[38] There is some potential overlap between consumer protection and the criminal negligence provisions of the Criminal Code, including provisions on negligence resulting in death (Art 359) or serious injury (Art 360).

E-commerce contracts

E-commerce transactions are regulated by Law 11 of 2008 on Information and Electronic Transactions (the IET Law, as amended by Law 19 of 2016),[39] and Government Regulation 82 of 2012 on the Implementation of Electronic Systems and Transactions.

The IET Law defines electronic contracts as contracts made using an electronic system (Article 1(17)), and as such, must include all the usual elements of a contract under Indonesian law (Article 47(2) of Government Regulation 82 of 2012). Electronic documents are lawful, provided the information contained within them is accessible, displayable, can be guaranteed to be complete, and can be justified (*dapat dipertanggungjawabkan*) (Articles 5 and 6 of the IET). Electronic transactions described in an electronic contract bind both parties (Article 18(1)). Parties to an international electronic contract have the authority to select which legal system and forum for arbitration will apply and, if they do not, the principles of private international law will apply (Article 18(2)–(5)). An electronic contract commences when an offer is received and agreed upon, and that must be substantiated by electronic statements (Article 20).

Article 9 provides that traders who offer products online must provide complete and accurate information regarding contractual provisions, producers, and the product on offer. Traders and other parties who facilitate online transactions must increase the security of online transactions, including access to electronic signatures (Article 12). Electronic signatures are further regulated by Article 11 of the IET Law and Articles 53–58 of the Government Regulation on Electronic Systems and Transactions.

The IET Law provides investigatory powers to civil servants whose scope of work and responsibilities cover information technology and electronic transactions (Article 43(1)). Criminal sanctions, including jail sentences, apply to offences under the Law (Articles 45–52). Offences include: illegally intercepting or accessing electronic transactions (Articles 30 and 31); altering, transmitting, moving, deleting, damaging, hiding, or exposing electronic information (Article 32); and creating, manipulating, altering, deleting, or damaging electronic information or documents with the intention of making them appear authentic (Article 33).

Construction contracts

Law 18 of 1999 on Construction Services came into force in 2000. Article 22(2) requires that all construction contracts include: the identity of the parties; a work plan; the contract term; the expertise involved and relevant qualifications of the parties; the rights and obligations of the parties; the payment process; the consequences of certain defaults; a dispute resolution clause; termination clauses; a *force majeure* clause; a clause dealing with construction failure; and worker protections (including workplace health and safety and social protection); and environmental considerations.

Article 22(3) requires planning and design contracts to include provisions on intellectual property rights. Under Article 22(6), construction contracts must be in Indonesian, or in the case of contracts with multinational parties, in Indonesian and English. Articles 25–28 establish liability for construction failures. Developers and builders remain liable for

[39] Chapter 21 discusses Law 11 of 2008 on Information and Electronic Transactions in the context of defamation.

up to ten years after the building's completion (Article 25(2)). Article 38 allows individual and class actions. If the community suffers as a result of construction work to the extent that it affects basic life functions, the government must side with, and act in the best interests of, the community (Article 38(2). Criminal punishment for developers and builders includes imprisonment for up to five years and a fine of up to 10 per cent of the contract's value (Article 43(1)).

16

Company Law

INTRODUCTION

In this chapter, we cover a key area of law relevant to doing business in Indonesia: the regulation of companies and other business entities. Other chapters of this book cover additional aspects of doing business. For example, Chapter 15 deals with contract law, Chapter 17 with labour law, Chapter 18 with foreign investment, Chapter 19 with banking, finance and insolvency, and the subject of Chapter 20 is competition law.

The corporate landscape in Indonesia is characterized by the dominance of large business groups or conglomerates (*konglomorat*), which often straddle diverse sectors. Ownership of the publicly listed companies that own these groups tends to be highly concentrated in the hands of individuals, the government, or a small group of families. According to a 2011 study by financial services company Credit Suisse, 61 per cent of Indonesian publicly listed firms were family owned.[1] This is consistent with previous studies finding that in 2008, 132 of the top 200 publicly listed companies were family-controlled, with 26.5 per cent of them owned by just ten families. While family-controlled ownership declined slightly from 1996 to 2008, state-controlled ownership increased over the same period.[2] In 2017, family-owned firms still owned 60 per cent of all publicly listed companies.[3] As will be seen, these factors create ongoing challenges for corporate governance, including minority shareholders. They also create significant problems of unfair competition, which are explained in detail in Chapter 20.

COMPANIES AND OTHER BUSINESS ENTITIES

Recognized business entities in Indonesia include sole proprietorships, private limited liability companies, publicly listed limited liability companies, cooperatives, state-owned enterprises (including public companies and state share companies), civil companies, general partnerships, and limited partnerships. We begin with a short overview of partnerships and cooperatives, before focusing on companies, including, briefly, shari'a (Islamic law) compliant businesses, and state-owned enterprises.

PARTNERSHIPS

Partnerships based on a private contract between the parties are governed by the Indonesian Commercial and Civil Codes. Two main types of partnerships are recognized:

- General partnerships (*perseroan firma*). These carry out a business under a single name (Article 16 of the Commercial Code). Each partner has authority to act on behalf of the partnership, including entering legally binding transactions with third parties, provided this does not go beyond the partnership contract (Article 17). All

[1] Ernesto J Poza, *Family Governance: How Leading Families Manage the Challenges of Wealth* Credit Suisse (2011).

[2] Richard W Carney and Travers Barclay Child, 'Changes to the Ownership and Control of East Asian Corporations between 1996 and 2008: The Primacy of Politics' (2013) 107(2) *Journal of Financial Economics* 494.

[3] Alessandro Gazzini, *Indonesia (Listed) Family Owned Business Performance* AT Kearney (24 January 2017) <https://www.linkedin.com/pulse/indonesian-listed-family-owned-business-performance-gazzini>.

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partners are jointly and severally liable for all contractual obligations of the partnership (Article 18).

- Limited partnerships (*perseroan komanditer*). These are established by one or more individuals who run the partnership and one or more individuals who provide the capital for the partnership. Those who run the partnership are jointly and severally liable for the partnership's liabilities but those who provide the capital are not liable beyond their capital investment, unless they become involved in the management of the partnership (Articles 20–21).

Establishment of partnerships

General partnerships are established by notarial deed (*akta notaris*), which must be registered with the local district court where the partnership is domiciled (Article 23 of the Commercial Code). The deed must include: the name, professions, and addresses of each partner; a statement indicating whether the partnership is general or limited; any restrictions on the authority of partners to bind the partnership; the proposed period of existence of the firm; and provisions relevant to third party rights with respect to partners (Article 26).

COOPERATIVES

Cooperatives are member-based legal entities, designed to support community-based economic and social welfare activities. They are governed by Law 25 of 1992 on Cooperatives (the Cooperatives Law). Based on communal principles (*asas kekeluargaan*) (Article 2 of the Cooperatives Law), they are designed to improve the welfare of their members, and the community in general (Article 3). 'Primary cooperatives' must have at least twenty members (Article 6(1)), while 'secondary cooperatives' must consist of at least three primary cooperatives (Article 6(2)).

Cooperatives are established by a deed of establishment, accompanied by articles of association (Article 7(1)). They are governed by the meeting of members, which holds ultimate authority over the cooperative, a board of managers, and a board of supervisors (Article 21). Cooperative profits must be distributed fairly between members in accordance with each of their contributions (Article 5). Membership is voluntary but restricted to Indonesian citizens who have legal competence and meet requirements set out in the cooperative's articles of association (Article 18(1)).

Indonesia is home to about 150,000 active cooperatives but their importance to the national economy remains small. In 2015, they contributed only 1.7 per cent to gross domestic product (GDP), and, in 2016 only 3 per cent.[4] A Cooperatives Law was enacted in 2012 to strengthen cooperatives and improve their professionalism, to increase their contribution to national economic development.[5] However, in 2014 the Constitutional Court ruled the entire Law unconstitutional, primarily for treating cooperatives like corporations (*perseroan terbatas*, PT, discussed below), thereby undermining the 'true spirit' of cooperatives as communal entities.[6] The Court's lengthy decision referenced Article 33(1) and (4) of

[4] Nabilla Tashandra, 'Jumlah Koperasi di Indonesia Terbanyak di Dunia, Tapi Sumbangan ke PDB Sangat Kecil' *Kompas* (28 January 2016) <http://bisniskeuangan.kompas.com/read/2016/01/28/134603626/jumlah.koperasi.di.indonesia.terbanyak.di.dunia.tapi.sumbangan.ke.PDB.sangat.kecil>; 'Koperasi Semakin Dilupakan' *Kompas* (10 July 2017).

[5] Law 17 of 2012 on Cooperatives.

[6] Decision 28/PUU-XI/2013. See 'UU Perkoperasian Dibatalkan Karena Berjiwa Korporasi' *Hukumonline* (28 May 2014) <http://www.hukumonline.com/berita/baca/lt5385bfa83b01f/uu-perkoperasian-dibatalkan-karena-berjiwa-korporasi>.

the Constitution, which state that 'the economy shall be organised as a shared project based on communal principles' and 'the national economy is based on economic democracy that recognises fairness, togetherness, and efficient justice'. The 2012 Cooperatives Law had granted board members authority to propose directors, dismiss members, and accept or reject new members (Articles 50(1)(a), 55(2)(a), (e), and 56(1)), which, the Court decided, neglected the 'democratic and communal spirit' that underlay cooperatives. The Court also found that Articles 68 and 69, which required members to purchase a cooperative capital certificate (*sertifikat modal koperasi*), compromised the 'voluntary and open' membership structure of cooperatives.

The Court's invalidation of the 2014 Law means that its predecessor—the 1992 Cooperatives Law—remains in force.

COMPANIES

Law 40 of 2007 on Limited Liability Companies (the Corporations Law) is Indonesia's primary statute regulating companies. Article 1(1)) defines a company as:

> a legal entity comprising a collection of capital, established by agreement, performing business activities with capital, all of which is divided into shares and fulfilling the requirements stipulated in this law and its implementing regulations.

The basic governance structure of Indonesian corporations consists of the general meeting of shareholders (who own the company), the board of directors (who manage the company); and the board of commissioners (who oversee the company and advise the directors) (Article 1(2)). Indonesia thus has a two-board system, as do many civil law jurisdictions. The Minister of Law and Human rights maintains a publicly available company register containing key information about companies, such as their articles of association (Article 29).

Limited liability

Shareholders generally have no personal liability for company conduct or for losses beyond the value of their shareholdings (Article 3(1)). However, liability will not be limited if: the company is not validly incorporated; or the shareholders have, in bad faith, used the company for their personal interests, been involved in illegal conduct perpetrated by the company, or have illegally used company assets, leaving it unable to pay its debts (Article 3(2)).

Incorporation

Establishing most corporations requires at least two founders and a notarial deed in the Indonesian language (Article 7(1) of the Corporations Law). The founders must have shareholdings in the company (Article 7(2)) and if, after incorporation, the company comes to have only one shareholder, the sole shareholder must transfer a portion of shares to another person within six months (Article 7(5)). If not, the company loses its legal personality and the sole shareholder becomes personally liable for the company's debts (Article 7(6)).[7] The notarial deed of incorporation must include the articles of association and identify the company founders, directors, commissioners and shareholders (including their shareholdings), along with a nominal share value that has been subscribed and paid up (Article 8). Incorporation applications can be lodged online (Article 9(1)).

[7] Some exceptions to the provisions of Art 7 (1), (5), and (6) apply for state-owned companies and some financial institutions governed by investment laws, which may have concentrated ownership.

All corporations must place the words *Perseroan Terbatas* (limited company), or its acronym 'PT', before their name, wherever and whenever it is used (Article 16(2)). Public corporations must add the letters *Tbk* (Article 16(3)), which is short for 'Terbuka' (Open).

A company acquires legal status from the publication date of the ministerial decision recognizing its legal personality (Article 7(4) of the Corporations Law). This must be announced in the official State Gazette Supplement (*Tambahan Berita Negara Republik Indonesia*) within fourteen days (Article 30).

Once a company has been established, other procedural requirements are to be met, including:

- obtaining a certificate of company domicile from the local government;
- obtaining a business trading licence and company registration certificate from the Ministry of Industry and Trade;[8]
- registering with the Ministry of Labour for the workers' social security programme (for companies with more than ten workers or a payroll of Rp 1 million or more) or establishing an equivalent social security package;[9] and
- registering with the tax office.[10]

Although procedures for starting up companies have been simplified in recent years, the World Bank rates Indonesia very poorly on 'ease of starting a business' (151 out of 190 economies). By comparison, Malaysia ranks 54, Thailand 85 and China 151. In Indonesia, starting up typically involves eleven procedures, taking an average of 24.9 days.[11]

Articles of association

Article 15(1) of the Corporations Law requires that articles of association include:

- the company's name, address, purpose, aims, activities, and period of establishment (whether fixed or infinite) (see also Article 6);
- the company's subscribed capital and paid-up capital, total number of shares, share classifications and associated shareholder rights, and the nominal value of each share; and
- the titles and number of directors and commissioners; the location and procedures for general shareholders meetings; procedures for recruiting, replacing and terminating directors and commissioners; and procedures for using profits and distributing dividends.

Changes to company articles of association must be approved by the general shareholders meeting and require a quorum of two-thirds of voting rights and two-thirds of votes at the meeting to pass (Article 88). Shareholders must be given clear notice of any proposal to change the articles of association (Article 19) and some changes require approval

[8] Art 3, Trade Minister Regulation 36/M-DAG/PER/9/2007 as amended by Trade Minister Regulation 46/M-DAG/PER/12/2011.

[9] Art 6, Law 7 of 1981 concerning Mandatory Labor Affairs Reports; Ministry of Manpower and Transmigration Regulation PER.14/2006 concerning Guidelines for Company Manpower Reports; Circular Letter of the Ministry of Manpower and Transmigration SE.3/MEN/III/2014 concerning the Implementation of Company Mandatory Labor Affairs Reports; Presidential Regulation 109 of 2013 on Social Security Program Membership Phasing.

[10] Directorate General of Taxation Regulation Per- 38/PJ/2013 concerning Procedures for Applying for Taxpayer Registration and/or Taxable Entrepreneur Number, Amendment of Data and Transfer of Taxpayer and/or Taxable Entrepreneur; World Bank, *Doing Business 2017: Equal Opportunity for All* (World Bank Group 2017) 23–30 http://www.doingbusiness.org/~/media/wbg/doingbusiness/documents/profiles/country/idn.pdf.

[11] ibid 19.

of the Minister of Law and Human Rights (Article 21). These include changes to: the company's name, address, purpose, aims or activities; its term; the size of its authorized, paid-up, or subscribed capital; and its status—from proprietary limited to public or vice versa (Article 21(2)). The Minister must be notified of all other changes (Article 21(3)) but approval is not required. Any changes to the articles of association approved at the general meeting of shareholders must be written in Indonesian and take the form of a notarial deed (Article 21(4)), which must be made within thirty days of the meeting. If required, ministerial approval must be sought within thirty days of the notarial deed being created.

Changes requiring ministerial approval take effect from the date the Minister's decision is published. All other changes take effect when the Minister publishes an acknowledgement of notification.

Shares and capital

Authorized capital consists of all shares and their nominal value. The minimum authorized capital for most companies is Rp 50 million (US$ 5,150) but is higher for companies operating in specific sectors (Article 32). Shareholders or other creditors who claim a debt owed by the company cannot use their creditor rights to avoid paying for shares that they have acquired unless approved by the general shareholders' meeting (Article 35(1)). At least 25 per cent of authorized capital must be issued and paid-up in full at the time of establishment (Article 33).

Buy backs

Generally, companies must not issue shares to themselves or to entities in which they own shares (Article 36). Companies may, however, buy back shares already issued, provided that the:

- re-acquisition does not cause the company's net assets to fall below the reserve capital set aside (Article 37(1)(a));
- nominal value of the shares re-purchased by the company, or entities in which the company owns shares, does not exceed 10 per cent of the company's issued capital (Article 37(1)(b)); and
- re-purchased shares do not carry shareholder meeting voting rights, cannot be counted in a quorum, and do not carry dividend entitlements (Article 40).

Raising capital

Raising company capital requires general shareholders' meeting approval unless delegated to the board of commissioners (Article 41). A decision to raise subscribed and paid-up company capital within the authorized capital limit requires a quorum of 50 per cent of all shares with voting rights and approval by more than 50 per cent of all votes, unless the articles of association stipulate a higher threshold (Article 42(2)).

Shareholders have pre-emptive rights: all newly issued shares must first be offered to existing shareholders in proportion to their current holdings of the same share type, unless the share issuing: is for company employees; converts existing obligations or effects, with shareholder approval; or is part of a shareholder-approved restructure (Article 43(1) and (3)). However, the company can offer the shares to third parties if existing shareholders do not accept the offer within fourteen days (Article 43(4)).

Issuing shares

Shares must be issued using a nominal value in rupiah (Article 49). Their value must be reasonable and determined in accordance with market value or by an independent expert (Article 34(2)). Generally, shareholding entitles holders to attend and vote at general shareholder meetings, be paid dividends, and receive any remaining assets if liquidation occurs (Article 52(1)(b)). The articles of association can set out different classifications of shares, including shares: with or without voting rights; with special rights to nominate directors or commissioners; that are revoked or exchanged for another type of share after a certain period; and so on (Article 53(4)).

Capital reduction

A valid decision to reduce company capital must meet the quorum and voting requirements in the articles of association (usually two-thirds of voting rights and two-thirds of votes present). Once made, directors must announce the decision to all company creditors in at least one national Indonesian-language newspaper within seven days (Articles 1(14) and 44). Creditors can then object in writing to the company, copying in the minister (Article 45(1)).

Shareholders

The general meeting of shareholders is the 'organ of the company that holds authority that has not been given to the directors or board of commissioners' (Article 1(4)). The general meeting of shareholders can make decisions that directors and commissioners cannot (Article 75(1)). These include: permitting directors to transfer company assets (Article 102(1)); appointing and dismissing directors and commissioners; approving mergers and takeovers; and winding up the company (Articles 89, 142, and 143).

Shareholders own the company, having provided its capital. Even so, they usually have no direct 'interest' in the company's assets, because the company is a separate legal entity to the shareholders. They do have an interest in how the company is managed in the sense that they can sue the directors for negligence or breach of duties causing loss to the company. However, these actions are brought in the company's name, not the shareholders' (Article 97(6)).

Aggrieved shareholders can also sue for damage for unfair or unreasonable conduct by the company resulting from a decision of the general meeting of shareholders, the board of directors, or the board of commissioners (Article 61(1)). Shareholders can also ask the company to purchase their shares at a reasonable price if they disagree with company actions that cause losses to shareholders or the company. These include: changing the articles of association; transferring or securitising assets worth more than 50 per cent of company assets; and mergers, consolidations, takeovers, and company break-ups (Article 62(1)). The Law does not specify whether the company must purchase these shares if asked. However, if shares to be bought back are worth more than 10 per cent of the total capital of the company, the company should try to sell them to a third party. To assist with these claims, shareholders can seek a court order to inspect the company's records if they suspect that any director or commissioner has committed an illegal act that caused loss to shareholders or third parties (Article 138(3)).

However, it appears that shareholders rarely avail themselves of this option. According to the World Bank:

> [V]ery few of these legal actions are applied in practice. Some observers indicate that a combination of passive minority shareholders, expensive court actions, and lack of experience of

judges in capital market matters have meant that there are very few (if any) private actions taken under the law.[12]

Annual general meetings

Companies must hold annual general meetings within six months of the end of the financial reporting year (Article 78(2)). General shareholder meetings can be called whenever the company's needs and interests so require (Article 78(4)). A single shareholder or shareholders holding at least 10 per cent of company shares can request a meeting to be held at a particular time, as can the Board of Commissioners (Article 79(2)). If this request is not met within fifteen days, shareholders can bring the matter before a district court (Article 80(1)). Shareholder meetings must take place in Indonesia, either where the company is domiciled or primarily operates, or where its stocks are listed on the exchange (Article 76(1)–(3)).

Invitations to shareholder meetings must be issued at least fourteen days before the meeting date (not including the date of the meeting and the date of the invitation) (Article 82(1)) by letter and/or advertisement in a national Indonesian-language newspaper (Articles 1(14) and 82(2)).

Quorum and decision-making procedures

General shareholder meetings can proceed if shareholders representing at least half of all shares with voting rights attend or are represented by proxies, unless 'otherwise provided by law' or the articles of association (Article 86). Each share carries one vote, except for shares belonging to the company or an entity partly owned or controlled by the company, unless the articles of association stipulate otherwise (such as by providing for shares without voting rights) (Article 84). In theory, decision-making should be 'based on deliberation and consensus building' (Article 87(1)) but if this fails, decisions are made by simple majority, unless the law or the articles of association require a higher majority (Article 87(2)).

Articles of association can be validly changed at meetings attended by at least two-thirds of those with voting rights, if agreed to by two-thirds of votes at the meeting, unless the articles themselves require higher thresholds (Article 88(1)). A quorum of three-quarters of all votes and the agreement of three-quarters of the votes of those of attending is required to approve: mergers, acquisitions, or separations; applications for insolvency; extending the duration of company existence; or dissolution of the company (Article 89).

Distribution of profits

Companies must put aside an unspecified percentage of their profits each financial year as a reserve (Article 70(1)), so that their reserve capital is at least 20 per cent of all issued and paid-up capital (Article 70(3)). All remaining capital should be distributed as dividends unless otherwise decided by the general shareholders meeting. Dividends must not be distributed unless the company has positive net assets (Article 71(3)).

Reporting requirements

Companies must submit annual general reports within six months of the financial year ending (Article 66(1)). These must include:

[12] World Bank, *Corporate Governance Country Assessment for Indonesia* (World Bank Group 2010) 17.

- a financial report (including a balance sheet, a profit and loss statement, a cash flow report, an equity report, and notes on financial statements);
- a company activity report;
- a social and environmental responsibility report;
- details of any problems arising during the year that affected business activities;
- a report of oversight activities undertaken by the committee of commissioners; and
- the names of directors and commissioners, and their wages and benefits (Article 66(2)).

Public companies, companies involved in raising and managing charitable funds, state-owned companies, companies that publicly disclose their debt, and companies with assets over Rp 50 billion, must submit their balance sheet and profit-loss statement to a public accountant for auditing (Article 68).

Social and environmental responsibility

Corporate social and environmental responsibilities are imposed through Chapter V of the Corporations Law and Government Regulation 47 of 2012 on the Social and Environmental Responsibilities of Limited Liability Companies. Companies working in the resources sector must implement social and environmental responsibility programmes (Article 74(1) of the Corporations Law). Indeed, boards of directors must include social and environmental responsibilities in yearly work plans (Article 4 of Government Regulation 47 of 2012). These obligations must be budgeted and accounted for as company expenses and carried out with attention to 'suitability and appropriateness' (Article 74(2) of the Corporations Law; Articles 3 and 4 of Government Regulation 47 of 2012). This phrase appears to refer to the financial capacity of the company.[13]

No other legislative or regulatory provisions specify what constitutes appropriate corporate social responsibility (CSR) activity. Companies who do not meet these responsibilities can, nonetheless, be punished (Article 74(3) of the Corporations Law; Article 7 of Government Regulation 47 of 2012). However, the legislation does not identify who enforces these provisions and in what circumstances. Commentary therefore suggests that, while a positive initiative, the CSR regulations are too vague and lack the guidance and compliance mechanisms necessary for significant impact:

> While Article 74 offers hope to those trying to improve corporate practices in Indonesia, its successful implementation is still in doubt, for a number of reasons. First, the substance is too general, insubstantial, and ambiguous. Second, it currently fails to provide any implementation mechanism, and provides little clarity on how the Article would be implemented and monitored. Third, there is a lack of research on the potential negative impacts of Article 74: for example, unequal treatment toward different corporations. Fourth, there is no clear direction from either the drafters or government as to exactly what this Article is intended to achieve, in which direction to bring the field of CSR, and how to go about attaining these goals. In short, Article 74 faces a crisis of vision.[14]

This lack of direction is difficult to reconcile with Indonesia's adoption of a mandatory CSR system rather than a voluntary one. In this, Indonesia is almost unique, because most other countries treat CSR as strictly voluntary. In Chapter 18, we discuss an unsuccessful constitutional challenge to the mandatory system.

[13] The company's CSR activities should not jeopardize its other financial legal obligations: elucidation to Art 5(1), Government Regulation 47 of 2012.

[14] Patricia Rinwigati Waagstein, 'The Mandatory Corporate Social Responsibility in Indonesia: Problems and Implications' (2011) 98(3) *Journal of Business Ethics* 455, 465.

Board of directors

Company directors have 'full authority and responsibility for the management of the company in the interests of the company … in accordance with its articles of association' (Articles 1(5) and 92(1) of the Corporations Law). A company must have at least one director (Article 92(3)). Directors must not, within five years before appointment, have been declared bankrupt. Likewise, in the same period, directors or commissioners must not have been found responsible for a company's bankruptcy or convicted of a criminal offence involving national finances or the financial sector (Article 93).

Publicly listed companies must have at least one 'independent' director.[15] An independent director is selected through a shareholder meeting and must not: have an affiliate relationship with the controlling shareholder within six months before appointment; have any affiliate relationship with a company commissioner or director; direct another company; or have been an 'insider' in a supporting institution or capital market provider used by the listed company within six months before appointment.[16]

The general meeting of shareholders appoints company directors using procedures set out in the articles of association (Article 94). The general meeting of shareholders also determines directors' wages and bonuses, unless delegated to the board of commissioners (Article 96). Directors represent the company in and out-of-court (Article 98), unless they have a conflict of interest or are sued by the company (Article 99).

Minority shareholders cannot influence directorial appointments. Indonesian law does not impose mechanisms allowing non-controlling shareholders to appoint or elect board members, such as proportional representation or cumulative voting.

Duties

Directors are subject to what are known as 'fiduciary duties'. They must, therefore, run the company in the interests of the company and in accordance with the intent and purposes for which it was established (Article 92(1)). This directors must do in 'good faith and with complete responsibility' (Article 97(2)). Indeed, directors will be personally responsible for any losses they cause the company if they are at fault or negligent when performing their duties (Article 97(3)). The Corporations Law does not, however, specify the standard of responsibility owed or what constitutes failure to uphold it.

Indonesia's 2006 voluntary Code of Good Corporate Governance (discussed further below) articulates these standards and duties, which include: formulating the vision, mission, and values of the company; effective and efficient resource management; consideration of stakeholder interests; risk management; establishing internal controls; social responsibility; and accountable reporting.[17]

Disclosure requirements

Directors must disclose shares owned by them and their family members in both the company and other companies (Article 101(1)). Directors who do not report this to the company and cause the company losses will be held personally liable for those losses.

Directors' liability

Directors are jointly and severally liable (Article 97(4)) for losses they cause to the company through their fault or negligence (Article 97(3)). Directors are not liable for company losses if:

[15] Art III.1.5.1, Indonesia Stock Exchange Listing Requirements, Kep-00001/BEI/01-2014.
[16] Art III.1.5.2, Kep-00001/BEI/01-2014.
[17] *Code of Good Corporate Governance* (National Committee on Governance 2006) 18–19 <http://www.ecgi.org/codes/documents/indonesia_cg_2006_en.pdf>.

- their fault or negligence did not cause the loss;
- they have managed the company in good faith, the interests of the company, and according to its purposes and aims;
- they have no conflict of interest in relation to the conduct that resulted in loss; and
- they acted to prevent or mitigate the loss (Article 97(5)).

If insolvency results, and funds are insufficient to meet all company obligations, the directors will be jointly and severally liable for those unmet obligations (Article 104(2)). However, directors will not be held liable for company bankruptcy if they satisfy the requirements of Article 97(5), above.

Board of commissioners

Like many European companies, Indonesian companies must have a board of commissioners and a board of directors. Its main function is to supervise and advise the directors on company management, in line with the articles of association (Article 1(6)). Every company must have at least one commissioner (Article 108(3)).

Like directors, commissioners must not, within five years before appointment, have been: declared bankrupt; a member of a board of directors or commissioners found responsible for a company's bankruptcy; or convicted of a criminal offence involving national finances or the financial sector (Article 110(1)).

Companies can appoint independent commissioners who are neither shareholders nor affiliates of other commissioners or directors of the company (Article 120). For public companies, at least 30 per cent of commissioners must be independent,[18] and for banks, at least half the commissioners must be independent.[19]

Duties

The Corporations Law does not detail the duties commissioners must perform or standards that apply to the performance of those duties. It does, however, provide that commissioners must supervise and advise the board of directors in good faith, with due care and responsibility in the interests of the company and in accordance with its purpose and aims (Article 114(2)). Like directors, commissioners must also report to the company any shares they or members of their families hold in the company or any other company (Article 116(b)).

The 2006 voluntary Good Corporate Governance Code (discussed below) articulates more standards and duties applicable to commissioners, and the powers they may exercise. These are considered in more detail later in this chapter but, briefly, they include: discretion to apply sanctions against directors; submission of an accountability report; and formation of committees to deal with issues arising, such as audits.

Commissioners' liabilities

Each commissioner is jointly, severally, and personally liable for his or her negligence that causes loss to the company (Article 114(3) and (4)). Commissioners will not be liable if they:

- performed supervision with good faith and care in the interests, and in accordance with the purpose and aims, of the company (Article 114(5)(a));
- had no direct or indirect conflict of interest that resulted in the loss (Article 114(5)(b)); and
- advised directors to mitigate the occurrence or continuation of the loss (Article 114(5)(c)).

[18] Art III.1.4.2, Indonesia Stock Exchange Listing Requirements, Kep-00001/BEI/01-2014.
[19] Art 24(2), OJK Regulation 55 /POJK.03/2016 on the Application of Governance for General Banks.

Article 115(3)(a)–(d) contains almost identical provisions exempting commissioners from liability for company debts if the company becomes insolvent, provided that their fault or negligence did not cause the insolvency (Article 115(3)(a)).

Shareholders with 10 per cent or more of total shareholdings with voting rights may bring a claim in the name of the company against commissioners who have caused company loss through their fault or negligence (Article 114(6)). Commissioners will be jointly and severally liable for company obligations if they cause insolvency through negligence. This liability extends to commissioners who are no longer employed but were on the board of commissioners in the last five years (Article 115).

Publicly listed companies

A public company is a company with at least 300 shareholders and at least three billion rupiah (about US$ 300,000) in paid-up capital (Article 1(22) of the Capital Markets Law).[20] To be listed, the principal regulator—the Indonesian Financial Services Authority (*Otoritas Jasa Keuangan*, OJK)[21]—must authorize it (Article 6). The company must also conduct an initial public offering (IPO) and apply to be listed on the stock exchange. Once listed, the company becomes subject to additional requirements imposed on all publicly listed companies,[22] including trading and membership rules, and regulations issued by KSEI (Indonesian Central Securities Depository, *Kustodian Sentral Efek Indonesia*) and KPEI (Indonesian Clearing and Guarantee Corporation, *Kliring Penjaminan Efek Indonesia*).

The Jakarta Stock Exchange and the Surabaya Stock Exchange merged in 2007 to create the Jakarta-based Indonesian Stock Exchange (IDX). Indonesia's equity market had, at the time of writing, been one of the best performing regional markets in recent years. However, it remains relatively modest by international standards, having only 557 listed companies,[23] compared to more than 900 in Malaysia, over 750 in Singapore, and around 650 in Thailand.[24] In 2016, market capitalization increased by 18.2 per cent to Rp 5,754 trillion (about AU$ 569 billion).[25] Stock market capitalization is still less than half of Indonesian GDP. By contrast, Malaysia, the Philippines, Singapore, and Thailand have more than 100 per cent of GDP.[26]

OJK

In 2011, Law 21 on the Financial Services Authority (OJK) was enacted. The OJK is an independent,[27] state-funded[28] institution with broad authority to regulate and supervise

[20] Law 8 of 1995 on Capital Markets.

[21] Until recently this role was conducted by the Bapepam-LK (the Capital Markets and Financial Institution Supervisory Board, *Badan Pengawas Pasar Modal-Lembaga Keuangan*), a division of the Ministry of Finance.

[22] Established under the Capital Market Law and Law 45 of 1995 on Capital Market Organisation, Law 21 of 2011 on the Financial Services Authority, and regulations issued by OJK.

[23] 'Stock Trading Snapshot' <http://www.idx.co.id/id-id/beranda/publikasi/statistik.aspx>.

[24] See <http://www.sseinitiative.org>.

[25] 'Performance Indonesia's Stock Market & Rupiah in 2016' *Indonesia Investments* (31 December 2016) <https://www.indonesia-investments.com/news/todays-headlines/performance-indonesia-s-stock-market-rupiah-in-2016/item7480>.

[26] Oxford Business Group, *The Report: Indonesia 2015* (Oxford Business Group 2015) 103.

[27] In 2014, provisions establishing the independence of the institution were subject to challenge in the Constitutional Court, along with three other articles relating to OJK's mandate to issue regulations and conduct supervision (Art 5), and its right to impose levies on financial services institutions (Arts 34 and 37). The applicants argued that only the central bank, Bank Indonesia, had the right to this independence. The Court ruled partly in favour of the applicants and struck down the phrase 'and free from interference from other parties' that immediately followed the word 'independent' in the definition of the body under Art 1(1), Law on the OJK. The Court rejected the applicants' other complaints. See Decision 25/PUU-XII/2014.

[28] According to Art 34(2), the OJK's budget comes from the state budget, and levies or fees from parties operating in the financial services sector.

the financial services sector, including the banking sector, capital markets and insurance, and non-banking financial institutions (Article 6 of the OJK Law).[29] The OJK has considerable powers to investigate the financial services sector. It can, for example, recruit civil servant investigators (Article 27(2)) to investigate people suspected of wrongdoing or a breach of capital market regulations (Article 49). These investigators have wide powers to obtain information, call and examine witnesses, conduct searches, and freeze accounts (Article 49).

The OJK can also: draft and propose rules, regulations and statutes; draw up and impose administrative sanctions on parties that violate financial services rules and regulations; and grant and revoke business licences (Articles 8 and 9). The OJK also receives and mediates consumer complaints (Article 29). It can order financial service institutions to resolve aggrieved consumers' complaints, pursue those institutions for failing to resolve them, and take legal action to recover lost assets and obtain compensation from parties that cause a consumer to suffer losses (Article 30).

The OJK is led by a board of commissioners, comprising nine members appointed by presidential decision. Two of these positions are reserved for Ministry of Finance and Bank Indonesia officials (Article 10).

Listing rules

The main requirements for listing on the Jakarta Stock Exchange are:

- limited liability status;
- registration verified by OJK;
- 30 per cent of commissioners being independent;
- at least one independent director;
- an audit committee and internal audit unit;
- a corporate secretary; and
- shares valued at least Rp 100 per share.[30]

Additional requirements apply depending on whether the company seeks listing on the IDX's Main Board or Development Board. On the Main Board, for example, the company must have:

- operated its core business for thirty-six continuous months;
- posted a profit for at least the past financial year;
- provided audited financial statements for the last three financial years (with the last two years and the most recent interim statement receiving unqualified opinions);
- net tangible assets of Rp 100 billion;
- at least 1,000 shareholders; and
- at least 300 million shares held by non-controlling and non-principal shareholders after the IPO before listing, equivalent to:
  - 20 per cent of the total paid-up capital, for a company with equity before the IPO of less than Rp 500 billion;

[29] It acquired responsibility for supervision and regulation of capital markets and non-bank financial institutions from Bapepam-LK on 31 December 2012 and banking regulation and supervision from Bank Indonesia on 31 December 2013 (Art 55).

[30] Art III.1 of Kep-00001/BEI/01-2014.

- 15 per cent of the total paid-up capital, for a company with equity before the IPO of Rp 500 billion to Rp 2 trillion; or
- 10 per cent of the total paid-up capital, for a company with equity before the IPO of more than Rp 2 trillion (Kep-00001/BEI/01-2014, III.2).

At the time of writing, the OJK was preparing a regulation to allow small and medium enterprises with assets of less than Rp 50 billion to conduct an IPO.

Foreign listings and foreign participation in the market

The Capital Markets Law permits foreign companies to be listed on the IDX (Article 1(15)). However, at the time of writing, no foreign firms had sought listing, despite government encouragement.[31]

Whether foreign ownership of listed companies is limited is a matter of significant debate. On the one hand, Law 25 of 2007 on Investment and Presidential Regulation 44 of 2016 on the List of Business Fields Closed to Investment and Business Fields Open with Conditions (commonly called the 'Negative Investment List') articulate percentage limits on foreign investment. On the other, the elucidation to Article 2 of the Investment Law distinguishes between direct investment and indirect investment through the stock market, and states that the provisions in the Law only apply to direct investment.[32] The 2016 Presidential Regulation also states that conditions it imposes do not apply to investment when it is done indirectly.

Acquiring shares in publicly listed companies

Any party, including a foreign investor, wishing to acquire shares for 50 per cent or more of a company, or to be able to control the management or 'policy' (*kebijaksanaan*) of a company, must make a tender offer for the remaining shares of that company (excluding certain types of shares. as outlined in Bapepam Decision KEP-264/BL/2011 on Public Company Acquisitions). The offer must be made in at least one Indonesian-language national newspaper; and the OJK must be informed within two days of the transfer of shares (Articles 1 and 3(a) of the Bapepam Decision).

Notably, directors, commissioners, and any party owning more than 5 per cent of shares must report their ownership to the OJK within ten days of the transaction.[33] Any transfers of shares worth more than 0.5 per cent of the value of the company in one or multiple transactions must also be reported to the OJK within this timeframe.[34]

CORPORATE GOVERNANCE

Since the Asian Financial Crisis in 1997, Indonesia has undertaken many corporate governance reforms. The International Monetary Fund (IMF) loans to help bail out Indonesia's largely insolvent banking sector were made conditional on many such reforms. Although the changes have been far-reaching, the resulting system is fragmented

[31] 'Foreign Firms Urged to Float Shares at Stock Exchange' *Tempo* (8 January 2017) <https://en.tempo.co/read/news/2017/01/08/056833724/Foreign-Firms-Urged-to-Float-Shares-at-Stock-Exchange>.

[32] Muhammad Faiz Aziz, 'Penanaman Modal dan Kepemilikan Saham di Pasar Modal' (2015) *Jurnal Rechtsvinding Online BPHN* <http://rechtsvinding.bphn.go.id/jurnal_online/Muhammad%20Faiz%20Aziz-Penanaman%20Modal%20dan%20Kepemilikan%20Saham%20di%20Pasar%20Modal.pdf>.

[33] Art 2(1), (2), OJK Regulation 11/POJK.04/2017 of 2017 on Reports on Ownership or Change in Ownership of Public Companies.

[34] Art 2(3), OJK Regulation 11/POJK.04/2017 of 2017 on Reports on Ownership or Change in Ownership of Public Companies.

and complex. Corporate misconduct remains common, but there is no single regulator monitoring compliance with corporations law. As mentioned, supervision of corporations, including formal incorporation and registration, is chiefly in the hands of the Ministry of Law and Human Rights but several other ministries, agencies, commissions, committees, and boards have additional bureaucratic and regulatory oversight in different contexts. These include: the OJK; the Commission for the Supervision of Business Competition, discussed in Chapter 19; the National Committee on Governance (*Komite Nasional Kebijakan Governance*, KNKG);[35] the Corruption Eradication Commission (KPK); and the Financial Transaction Reports and Analysis Centre (*Pusat Pelaporan dan Analisis Transaksi Keuangan*, PPATK).

Voluntary Code of Good Corporate Governance

Indonesian companies are encouraged to comply with the Code of Good Corporate Governance produced by the KNKG in 1999 and revised in 2001 and 2006. While the Code is voluntary, the government expects regulators to refer to the Code when formulating regulations on corporate governance.[36] The Code stipulates that companies should include a statement in their annual reports demonstrating their compliance with the Code (Part VII, Article 1). Because this is not mandatory, it is often ignored.

The Code covers: general corporate governance principles such as transparency, accountability, responsibility, independence, and fairness; the roles and functions of the key organs of the company; shareholders rights; corporate social and environmental responsibilities; and ethics, such as conflicts of interest, gifts and donations, confidentiality, and the protection of whistleblowers.

Sector-specific codes apply to certain companies. These include the Banking Sector Code (2004, 2013) and the Insurance and Reinsurance Code (2009). The KNKG has also published manuals on Business Ethics (2011), Whistleblowing Systems (2008), Audit Committees (2002), and Risk Management (2011). Again, although the KNKG encourages compliance, these are not binding.

In 2014, the OJK published the Indonesian Corporate Governance Roadmap, which is a reference for companies to improve good governance practices and regulations. It covers: the corporate governance framework; protection of shareholders; roles of stakeholders; transparency of information; and the responsibilities of boards of directors and commissioners.[37]

Shareholder approval for certain material transactions

Directors must obtain shareholder approval for 'material transactions', which include transfer or pledge of the company's assets as security for a loan, if transferred or pledged assets exceed 50 per cent of the company's net assets (Article 102 of the Corporations Law). As discussed above, shareholders can also ask the company to purchase their shares at a reasonable cost if they disagree with company actions that cause losses to shareholders or the company, such as through changes to the articles of association, transferring more than 50 per cent of the company's assets, mergers, acquisitions, takeovers, and separations (Article 62(1) of the Corporations Law).

[35] The KNKG was initially the National Committee on Corporate Governance (*Komisi Nasional Kebijakan Corporate Governance*, KNKCG) but its scope was widened in 2004 to address public governance more broadly: Coordinating Minister for the Economy Decision Kep-49/M.EKON/11/2004.

[36] See Preamble B (Art 7) and Part I (Art 1.8) of the Code.

[37] OJK, 'Indonesia Corporate Governance Roadmap' <http://www.ifc.org/wps/wcm/connect/a476310042e2a54bbc09fc384c61d9f7/Indonesia+CG+Roadmap.pdf?MOD=AJPERES>.

In 2011, Bapepam (now OJK) issued Regulation IX.E.2, which expanded the types of activities considered material transactions. A single transaction or series of transactions with a value of 20 per cent or more of company assets is material if it relates to the following activities: a subscription in a certain business entity, project, and/or business activity; the purchase, sale, transfer, or exchange of assets or business market; the leasing of assets; the lending and borrowing of funds; the granting of security over assets; or the granting of a company guarantee (Article 1(a), (2)). Although transactions between 20 and 50 per cent do not require shareholder approval, they must be publicized in an Indonesian-language national newspaper, with supporting documents sent to the OJK within two days of the transaction.

Conflicts of interest and related-party transactions

If the interests of directors or commissioners conflict with those of the company, they may be held liable for company losses or bankruptcy. Under Article 99 of the Corporations Law, directors lose authority to represent the company if the company brings legal action against them, or if they have a 'conflicting interest with the company'. This provision is vague and says nothing about directors or commissioners participating in decision-making if they have *possible* conflicts of interest. It also does not require companies to develop procedures to deal with such circumstances, such as disclosure obligations. By contrast, the Code of Good Corporate Governance prohibits parties with possible conflicts from participating in decision-making discussions and processes.[38]

More detailed conflict of interest and related-party transaction rules appear in the capital market rules for listed companies. 'Related-party transactions' (*transaksi afiliasi*) are defined as transactions carried out by a company (or a company under its control) with an affiliate of that company, or another company affiliated with that company's directors, commissioners, or major shareholders.[39] Any such transactions must be disclosed to OJK and publicly disclosed within two days of the transaction (Article 2(a)).

'Conflict of interest' is a conflict between the economic interests of the company and the personal economic interests of a director, commissioner, or major shareholder (Article 1(e)). If a conflict exists, pre-approval by shareholders without a conflict of interest is required. This approval must take the form of a notarial deed (*akta notaris*) (Article 3(a)). While these provisions might appear to be robust, no conflict of interest actions had been brought against any directors or commissioners at time of writing.

Audit committees

Under OJK Regulation 55/POJK.04/2015 on the Establishment of and Guidelines for Audit Committees, publicly listed companies must have an audit committee that: examines company financial reports; assesses compliance with regulations; and reviews the work of internal auditors and how company directors respond, among other tasks (Article 10). They are formed by and responsible to the board of commissioners and chaired by an independent commissioner (Articles 1(1) and 5). Audit committees must also have at least three outside experts who are not commissioners or directors (Articles 2–5). Audit committees must formulate a report to include in the company's annual report (Article 18). The Regulation includes sanctions for violations (Articles 22–23).

[38] Part III, Art 3.2, Code of Good Corporate Governance.

[39] Art 1(d), Attachment to Bapepam-LK Decision 412/BL/2009 on Affiliated Transactions and Conflicts of Interest in Specific Transactions.

Other efforts to strengthen corporate governance

The OJK has issued regulations designed to improve corporate governance, including:

- 32/POJK.04/2014 on Shareholders General Meetings;
- 33/POJK.04/2014 on Management and the Board of Commissioners;
- 34/POJK.04/2014 on Nominating Committees and Remuneration Committees;
- 35/POJK.04/2014 on Corporate Secretaries; and
- 29/POJK.04/2016 on Annual Reports of Listed and Public Companies.

Ongoing problems of corporate governance

KNKG identified poor corporate governance as a key contributor to the severity of the Asian Financial Crisis in Indonesia in the late 1990s. Although voluntary initiatives like the Code of Good Corporate Governance are welcome, the mandatory rules have major gaps that expose minority shareholders to corporate misconduct. In a corporate landscape marked by conglomerates with both privately held and publicly listed companies, controls on related-party transactions remain weak. Minority investor shares are reportedly often expropriated by majority shareholders engaging in related-party transactions.[40]

At present, comprehensive disclosure rules apply only to publicly listed companies and not private companies.[41] Only some types of self-dealing transactions require shareholder approval; many others, such as loans from affiliated banks and cross guarantees on assets within a corporate group, often escape scrutiny.

Organizations such as the World Bank and Asian Development Bank (ADB) have assessed Indonesia's compliance with international standards like the Organisation for Economic Co-operation and Development (OECD) Principles of Corporate Governance. For example, the ADB examined 100 companies in 2014, finding significant improvements in 2012 but only modest progress since 2013.[42] The quality of shareholder meeting notices[43] was often lacking or not delivered in sufficient time, the minutes were not appropriately disclosed, and dividends not paid within thirty-one days. Disclosure and transparency was also weak, including nondisclosure of the profiles and remuneration of directors, suspected insider trading and nonaudit fees paid to external auditors.

SHARI'A COMPANIES

Indonesia recognizes shari'a (Islamic law) compliant businesses, whose operations involve banking, Islamic bonds (*sukuk*), insurance, and microfinance. These are discussed in more detail in Chapter 19. Briefly, however, companies carrying out activities based on shari'a must meet the corporate governance requirements set out above and must also have a Shari'a Supervisory Board. This Board must have one or more shari'a experts, appointed by the general meeting of shareholders and recommended by the Indonesian Ulama Council

[40] Sylvia Veronica Siregar, 'Corporate Governance in Indonesia' in Frank Stephen, Franklin Ngwu, and Onyeka Osuji (eds), *Corporate Governance in Developing and Emerging Markets* (Routledge 2006) 163.

[41] See Bapepam-LK Decision 412/BL/2009.

[42] Asian Development Bank, *ASEAN Corporate Governance Scorecard: Country Reports and Assessments 2014* (Asian Development Bank 2016) 13–26 <https://www.adb.org/sites/default/files/publication/185624/asean-cgscorecard-2014.pdf>.

[43] In particular, there were problems with: the language of the notices; disclosure of the profile of board members to be appointed; disclosure of the profile of the independent auditor to be appointed; and disclosure of dividend policy in the AGM notice.

(*Majelis Ulama Indonesia*, MUI) (Article 109(1), (2) of the Company Law). The Board must advise the directors and monitor company activities to ensure compliance with shari'a principles (Article 109(3)).

CORPORATE CRIME

Companies in Indonesia have been implicated in both public and private sector corruption. One study found that 1,333 (or 73.7 per cent) of 1,808 Indonesian firms surveyed reported paying bribes in 2001, with the amount, on average, being over 10 per cent of annual production costs.[44] According to the Global Competiveness Report 2016–17, corruption remains the most significant barrier to doing business in Indonesia.[45]

A director or commissioner found liable for company losses through fault or negligence can be prosecuted for related or other criminal offences (Article 155 of the Corporations Law). For example, Article 20(1) of the 1999 Anti-Corruption Law[46] provides that companies and their managers can face criminal charges for corruption committed by a corporation, or in its name.[47] Indeed, the KPK appears now to be allocating more attention and resources to corporate corruption. Of the ninety-nine new cases the KPK investigated in 2016, twenty-eight involved private sector suspects.[48] However, while the KPK has successfully prosecuted individuals for corruption, it had not, at the time of writing, prosecuted a corporation.[49] Law enforcement officials had long complained that because the Criminal Procedure Code (KUHAP) does not outline procedures for pursuing corporations, investigating and indicting them was problematic.[50] This changed when the Supreme Court issued Regulation 13 of 2016 on Procedures for Handling Crime Committed by Corporations, which was designed to clarify the procedures involved in corporate prosecution. Under Article 3, corporate liability exists for crimes committed by any person who acts for and on behalf of the company. The Regulation also states that, when determining whether to hold corporations criminally liable, judges should consider whether the corporation:

- could obtain a benefit from the criminal act, or if the criminal act was committed in the interests of the corporation;
- allowed the act to be committed;
- failed to prevent the criminal act or a broader impact from the criminal act; and
- failed to ensure compliance with prevailing laws to prevent the criminal act from occurring.

The Regulation also outlines procedures for investigating, prosecuting, trying, and sentencing corporations. It allows corporate wealth or assets to be considered as evidence (Article 21) and seized if they are the proceeds of crime (Article 31).

[44] Ari Kuncoro, 'Bribery in Indonesia: Some Evidence from Micro-Level Data' (2004) 40(3) *Bulletin of Indonesian Economic Studies* 329.

[45] OECD, *OECD Economic Surveys: Indonesia 2016* (OECD Publishing 2016) <https://www.oecd.org/eco/surveys/indonesia-2016-OECD-economic-survey-overview-english.pdf>.

[46] Law 31 of 1999 on the Eradication of Corruption, as amended in 2001.

[47] We discuss corruption offences in Chapter 14.

[48] KPK, *Laporan Tahunan Komisi Pemberantasan Korupsi 2016* (Jakarta: Komisi Pemberantasan Korupsi 2016) 71.

[49] Agus Sahbani, 'Begini Prosedur Penanganan Pidana Korporasi' *Hukumonline* (3 January 2017) <http://www.hukumonline.com/berita/baca/lt586b81d2657f8/begini-prosedur-penanganan-pidana-korporasi>.

[50] 'Ketua MA: Kejahatan Korporasi Tidak Bisa Dijatuhi Pidana Badan' *Hukumonline* (28 December 2016) <http://www.hukumonline.com/berita/baca/lt58638356dc990/ketua-ma--kejahatan-korporasi-tidak-bisa-dijatuhi-pidana-badan>.

MERGERS AND ACQUISITIONS

Mergers

Indonesian law recognizes two types of mergers. The first is a 'consolidation merger' or amalgamation (*peleburan*), where two or more corporations merge to create a new corporation, to which the assets and liabilities of the consolidating companies are transferred (Article 1(10) of the Corporations Law). The pre-existing companies are dissolved on the date the merger takes effect (Article 112(3)(c)). The second type is an 'integration merger' (*penggabungan*), where two or more corporations merge under an agreement by which one of them receives the assets and liabilities of the other(s), with the transferrer(s) dissolving after the merger (Article 1(9)).

Procedures for mergers

Directors of the companies seeking to merge must compile a merger proposal (Articles 123(1), 124). The proposal must contain: the name and domicile of the companies involved; the reason for the merger; a statement from each board of directors; and details of how shares will be valued and converted to the new company. Once approved by each board of commissioners, the proposed merger must be approved at the general meeting of shareholders of each company (Article 123(2)).

Ministerial approval is required for both integration mergers that result in changes to the articles of association (Article 129(1)) and consolidation mergers (Article 130), for which a copy of the merger deed and a notification of changes to the articles of association of the pre-existing companies is required. Directors of the consolidated or new company must announce the merger in a newspaper within thirty days of the merger (Article 133).

Acquisitions

Legal entities or individuals—including a company's own shareholders or directors—can take over a company by acquiring previously issued shares or shares that are about to be issued (Article 125(1)–(2)). Before a company takeover, the directors of the company that plans to take over another must obtain approval from the general meeting of shareholders, with a quorum of three-quarters of all shares with voting rights and agreement from three-quarters of all voters attending (Articles 125(4) and 89). If company directors intend to take over another company, they must also advise the board of directors of the company they intend to take over (Article 125(5)).

Regulation of mergers and acquisitions

Article 1(4) of Government Regulation 57 of 2010 concerning Integration or Consolidation Mergers and Takeovers Resulting in Monopolistic Practices and Unhealthy Competition, defines 'monopolistic practices' as:

> a concentration of economic power by one or more business entities which results in their control of production and distribution of a good and/or service causing unhealthy competition and detriment to the public interest.

For mergers and acquisitions, 'unhealthy competition' occurs if the business entity leading the merger or acquisition 'makes an illegal contract, engages in illegal activities

and/or exploits their dominant position' (Article 2(2)).[51] These articles reflect provisions in the Anti-Monopoly Law (Law 5 of 1999 on Prohibition of Monopolistic Practices and Unhealthy Competition),[52] discussed in Chapter 21. As discussed there, the Commission for the Supervision of Business Competition (*Komisi Pengawas Persaingan Usaha*, KPPU) can assess whether a merger or acquisition will result in monopolistic practices and impose sanctions where necessary.[53] Mandatory reporting applies if, after the merger or acquisition, the company's assets exceed specified thresholds.

Company inspections

As mentioned above, if a company or its board of directors or commissioners is suspected of acting illegally and causing loss to shareholders or third parties, one or more shareholders representing at least 10 per cent of voting rights can ask a district court to order a company inspection (Article 138(1)–(3)). If this request is approved, the district court appoints three local experts to perform the inspection (Article 139(3)). Company employees or accountants, past or present, cannot be used (Article 139(4)). They can inspect all company documents and assets; and all directors, commissioners, and employees must provide all information necessary for the inspection (Article 139(5)–(6)).[54] The results of the inspection are confidential (Article 139(7)) but must be provided to the district court chairperson within ninety days of the inspectors' appointment. The chairperson then provides a copy to the requesting party and the company within fourteen days of receiving the report (Article 140).

STATE-OWNED ENTERPRISES

Indonesia has two categories of state-owned enterprises (*Badan Usaha Milik Negara*, BUMN). Public (state-owned) companies (*Perusahaan Umum* or *Perum*) are entirely state-owned, while state share companies (*Perusahaan Perseroan* or *Persero*) are majority-owned by the state but have other shareholders.

Public (state-owned) companies: *Perusahaan Umum/Perum*

These companies are primarily governed by Law 19 of 2003 on State-Owned Enterprises.[55] In early 2017, there were fourteen public companies, including news agency Antara, logistics agency Bulog, and fisheries agency Perikanan Indonesia.[56] They all have these purposes and objectives of:

a. contributing to developing the national economy in general, and to the income of the state in particular;
b. pursuing profit;

[51] As explained in Chapter 21, Law 5 of 1999 on Prohibition of Monopolistic Practices and Unhealthy Competition also prohibits agreements resulting in oligopolies, oligopolies, price fixing, and various other forms of cartels.

[52] Unhealthy competition is defined under Art 1(f). The Law also contains provisions on different types of prohibited contracts and practices. See generally, Chapter III—Prohibited Agreements (Arts 4–16); and Chapter IV—Prohibited Activities (Arts 17–24).

[53] See Arts 3 and 4, Government Regulation 57 of 2010.

[54] The district court can decide the inspection budget, which the company pays in the first instance (Art 141(1), (2)) but which the chief judge can order the requesting party to repay (Art 141(3)).

[55] Government Regulations 45 of 2005 and 41 of 2003.

[56] For all full list, see <http://www.bumn.go.id>.

c. benefiting the public by providing high-quality and satisfactory goods and/or services fulfilling the needs of the people;
d. pioneering commercial activities that the private sector and cooperatives have not yet pursued; and
e. actively participating in supervising and assisting small-scale entrepreneurs, cooperatives, and the community.[57]

Public (state-owned) companies are usually established by the president through government regulation, after being proposed by a minister and assessed by the Minister of Finance and related ministries (Articles 10 and 35(1)–(2)), State-Owned Enterprises Law). As mentioned, *Perum* are solely state-owned, so ownership is not divided into shares. They are managed by a board of directors, overseen by a supervisory board and an internal supervisory unit (Article 1(4) of the State-Owned Enterprises Law). While the Code of Good Corporate Governance formally applies to *Perum*, it has almost no practical application to them. This is because the Code presumes the existence of shareholders and assumes that the main function of corporations is to maximise profits for shareholders.[58] The key governance issue in public companies is, instead, holding the government accountable to the public for the company's management.

The minister responsible for a public company is neither responsible for the company's legal obligations nor liable for any losses unless he or she: has, in bad faith, used the company for personal interests; has unlawfully used company assets; or is involved in illegal conduct using the company (Articles 1(5) and 39).

State share companies: *Perusahaan Perseroan/Persero*

State share companies are also primarily governed by the State-Owned Enterprises Law.[59] Unlike public companies, their purpose is providing goods and services on a competitive basis and realising company profits (Article 12 of the State-Owned Enterprises Law). Most Indonesian SOEs are state share companies, and include Bank Mandiri, Bank Negara Indonesia (BNI), airport operator Angkasa Pura II, construction firm Wijaya Karya, toll road operator Jasa Marga, aircraft manufacturer Dirgantara Indonesia, and shipbuilder PT PAL.[60]

State share companies are proposed and established like public companies but they have capital divided into shares, of which the state must own at least 51 per cent (Article 1(2)). The governance structure of state share companies mirrors ordinary limited liability companies', with an additional internal supervisory unit (Article 67).

State-owned companies and corporate crime

Employees of public or state share companies are civil servants and hence subject to criminal sanctions applicable to officials under the 1999 Corruption Law (Article 1(2)(d)), including for accepting bribes.

[57] Art 2(1), 2003 State-Owned Enterprises Law.
[58] Miko Kamal, 'Corporate Governance and State-Owned Enterprises: A Study of Indonesia's Code of Corporate Governance' (2010) 5(4) *Journal of International Commercial Law and Technology* 206.
[59] They are also subject to Law 40 of 2007 on Limited Liability Companies; Government Regulation 45 of 2005; and Government Regulation 41 of 2003.
[60] For all full list, see <http://www.bumn.go.id>.

17

Labour Law

INTRODUCTION

Since 1998, employment law has been reformed as part of Indonesia's transition from authoritarianism to a more liberal, democratic state. Today, its labour law regime better recognizes international labour rights—particularly freedom of association through unions. These reforms have, however, been constrained by the need to maintain a system attractive to foreign investors, particularly in the manufacturing sector. Policymakers have faced competing pressures from unions, employers, and economists, as Indonesia's underperforming economy struggles to attract foreign capital.

The primary statute covering this area is Law 13 of 2003 on Labour. The overall impact of this Law and reforms to worker welfare and the investment climate more generally remains much debated. However, it appears that any success has been mixed, and is marred by inconsistent implementation. In any case, the benefits of most reforms are not available to many workers. This is because, according to Indonesian Central Bureau of Statistics figures, more than half the labour force works in the informal sector, excluding them from some or all of the legal protections introduced by the reforms.[1]

GENERAL CONDITIONS OF EMPLOYMENT

Working hours

The Indonesian working week comprises forty hours (Article 77(2) of the Labour Law). If an employer wants an employee to work longer, the employee must agree and be paid overtime (Article 78(1), (2)). For most sectors, overtime must not exceed three hours per day and fourteen hours per week (Article 78(1)(b)).[2] Employees must also receive higher rates for overtime, which are governed by ministerial regulations and increase the more hours worked; employees must also be given food and beverages if overtime exceeds three hours.[3]

Minimum wages and overtime

Indonesia has four kinds of minimum wage: provincial minimum wages; provincial sectoral minimum wages; city/county minimum wages; and city/county sectoral minimum wages (Article 89 of the Labour Law). These are proposed by wage councils, comprising: members of the government; the Indonesian Chamber of Commerce (*Kamar Dagang dan Industri*, KADIN); trade union representatives; and academics. For sectoral wages, the councils must include representatives of employers and employees from that sector

[1] Wachyu Winarsih and Vera Lisna, *Statistics on Informality in Indonesia* (Central Bureau of Statistics (BPS), presentation delivered in Chiba, Japan, 6 July 2015) <http://www.unsiap.or.jp/e-learning/el_material/PSS/1507_Informal/cr/Indonesia_cp1.pdf>.

[2] See the elucidation to Art 78(3)(1) for exceptions.

[3] Arts 7(1)(c) and 11, Ministry of Manpower Decision 102/MEN/VI/2004 on Overtime Hours and Overtime Pay.

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(Presidential Decision 107 of 2004 on Wage Councils).[4] Minimum wages must be revised at least once a year.[5]

Wage councils must balance: the consumer price index; productivity; economic growth; the capacity, progress, and sustainability of the businesses in question; existing wages; and market conditions.[6] They must also consider 'adequate living needs' (*Kebutuhan Hidup Layak*, KHL), which are estimated using factors set out in Attachment I to Ministry of Manpower Regulation 13 of 2012. These include 3,000 calories per day, clothing, housing and facilities, education, health, transportation, savings, and recreation. The estimates are made using questionnaires and local market surveys. While councils must consider the KHL, they do not have to meet or exceed it. According to Ministry of Manpower Regulation 21 of 2016 on Adequate Living Needs, the components of the KHL are reviewed by wages councils every five years, which then report to the minister (see Articles 5–11).[7]

Government Regulation 78 of 2015 also ties the minimum wage to changes in inflation and economic growth. Article 44 establishes the following formula for the calculation of wage increases:

> Wage = Current Minimum Wage + (Current Minimum Wage x (Inflation (%) + Annual Change in Gross Domestic Product (%))

Criminal sanctions for failure to pay minimum wages include imprisonment of one to four years or a fine of between Rp 100 million and 400 million (Article 185 of the Labour Law). Companies struggling to pay it can apply to the governor for an exemption or postponement of the obligation to pay it (Article 90(2) of the Labour Law).

Annual bonuses

Indonesian law requires payment of an annual 'religious holiday bonus' (*tunjangan hari raya*, THR).[8] Workers who have been employed for more than one month are eligible, and the bonus should be given once annually (depending on the religion of the employee), seven days before the religious holiday.[9] Workers employed for one year or more receive one month's salary, while workers employed for between one and twelve months receive a pro rata proportion of one month's salary.[10] Contractual or discretionary bonuses may also be paid.[11]

Leave

Employees do not have to work on official public holidays, except in designated industries (Article 85(1) and (2) of the Labour Law). Employees who work on public holidays are entitled to overtime (Article 85(3)). The Labour Law also provides leave for marriages, circumcisions, baptisms, and bereavement (Article 93(4)). Minimum annual leave is twelve days (Article 79(2)(c)).

[4] Below the provincial level, wage councils put forward their proposed wage to the mayor (for cities) or the regent (*bupati*, for counties), who then make a recommendation to the governor. The provincial wage council must accept this proposal before the governor can approve it. The proposed wage must exceed the provincial minimum (Art 4(2), Ministry of Manpower Decision KEP-226/MEN/2000).

[5] Arts 43 and 44, Government Regulation 78 of 2015 on Wages and Arts 6, 7, and 8, Ministry of Manpower Regulation 7 of 2013 on the Minimum Wage.

[6] These criteria are set out in: Ministry of Manpower, *Pedoman Penyusunan dan Pelaksanaan Upah Minimum* (1999). See also Art 88(4), 2003 Labour Law.

[7] At the time of writing, Attachment I to Regulation 13 of 2012 remained applicable.

[8] Arts 6(1) and 7, Government Regulation 78 of 2015 on Salaries.

[9] Arts 2 and 5(1)(4), Ministry of Manpower Regulation 6 of 2016 on Religious Holiday Bonuses for Company Employees.

[10] Art 3, Ministry of Manpower Regulation 6 of 2016 on Religious Holiday Bonuses for Company Employees.

[11] Arts 5(1), 6(2), Government Regulation 78 of 2015 on Salaries.

Sick leave entitlements include full pay for the first four months, 75 per cent for the second four months, 50 per cent for the third four months, and 25 per cent thereafter (Article 93(3)). Women who suffer from menstrual pain can take up to two days of paid menstruation leave per cycle (Article 81). Women are also entitled to three months of maternity leave—one and a half months before the birth, and one and a half months after it (Article 82(1)). Women who miscarry may have one and a half months of paid leave (Article 82(2)).

Social security

Employees and their families are entitled to social security (Article 99 of the Labour Law). Employers must provide welfare facilities in accordance with their means (Article 100).

The social security system has undergone significant reform over the past decade. In the past, the social security system was managed by five separate agencies: Jamsostek (*Jaminan Sosial Tenaga Kerja*, Workforce Social Security) for employees in private companies; Taspen (*Dana Tabungan dan Asuransi Pegawai Negeri*, Civil Servants Pension Fund) and Akses (*Asuransi Kesehatan Indonesia*, Indonesian Health Insurance) for civil servants; Asabri (*Asuransi Sosial Angkatan Bersenjata Republik Indonesia*, Indonesian Armed Forces Insurance) for the police and military; and, after 2005, Jamkesmas (*Jaminan Kesehatan Masyarakat*, Community Health Insurance) for the poor and near-poor.

Law 40 of 2004 on the National Social Security System set in motion major changes to the administration and management of social security. It provided for the establishment of new social security administrative agencies (*Badan Penyelenggara Jaminan Sosial*, BPJS) (Article 5(1) and (2)) and extended coverage to all Indonesians (Article 2), whether employed in the formal or informal sector. In 2011, a new statute was passed to strengthen the legal basis of the BPJS: Law 24 of 2011 on Social Security Administrative Agencies (BPJS). The BPJS Law established two new agencies: BPJS Workforce and BPJS Health (Article 5(2) of the BPJS Law).

On 1 January 2014, BPJS Health took over the provision of health care services and Akses was dissolved (Article 60(1) of the BPJS Law). At the same time, BPJS Workforce also took over Jamsostek's role in implementing workplace social security services (Article 62(1)). Asabri and Taspen must transfer responsibilities for workplace social security services for civil servants and police and military officials to BPJS Workforce by 2029 (Article 65).

Every individual, including foreigners employed for more than six months in Indonesia, must now participate in the social security programme implemented by BPJS (Article 14 of the BPJS Law). Employers must register themselves and their employees as participants in the BPJS system (Article 15(1)). Under the previous Jamsostek regime, only employers with ten or more employees or paying wages exceeding Rp 1 million per month were required to participate.[12] Employers that fail to register for the BPJS scheme face administrative sanctions, including written warnings, fines, or denial of certain public services (Article 17(1), (2)).[13] Employers must pay premiums to BPJS (Article 19).

Presidential Regulation 12 of 2013 on Health Insurance[14] also governs aspects of health care administration. Health care recipients are divided into beneficiaries of insurance premium subsidies (PBI) (generally the poor) and non-PBI (generally salaried employees,

[12] Art 2(3), Presidential Regulation 14 of 1993 on the Administration of the Workforce Social Security Program.

[13] Sanctions are also imposed by Government Regulation 86 of 2013 on the Procedure for Imposing Administrative Fines on Employers, excluding State Officials, Certain Others, and Employers, Workers, and Recipients of Social Security.

[14] As amended by Presidential Regulation 111 of 2013, Presidential Regulation 19 of 2016, and Presidential Regulation 28 of 2016.

freelancers and non-salaried employees, and those not in employment and their families) (Articles 2–5 of the Regulation). The government registers PBI recipients (Article 10), while every employer must register itself and its employees for the programme (Article 11(1)). Premiums are paid by the employer and the employee (Article 16(2)). Non-salaried employees, people not in employment, and their families must register themselves (Article 11(3), (4)). For salaried employees, premiums are 5 per cent of their monthly salary, with 4 per cent paid by the employer and 1 per cent paid by the participant.[15] For non-salaried employees and people not in employment, the premiums vary depending on the type of facilities (see Article 16F).

Four workplace social security programmes are covered by BPJS Workforce:

- workplace or occupational accident insurance;[16]
- life insurance;
- the old-age pension; and
- an old-age fund (Article 6(2) of the BPJS Law).[17]

The workforce programme's implementation depends on the scale of the business entity.[18] Large and mid-size companies must register for all four programmes. Small-scale enterprises must register for accident insurance, life insurance, and the old-age fund, while micro-scale enterprises must only register for accident and life insurance programmes (Article 6(3)). The premiums payable for each type of programme vary, and are set out in three government regulations.[19]

Anti-discrimination and equal opportunity

Articles 5 and 6 of the Labour Law prohibit discrimination and mandate equal opportunity in recruitment and in employee treatment. The elucidation to these articles state that 'discrimination' includes discrimination of the basis of gender, ethnicity, race, religion, and political affiliation.

Trade unions and collective bargaining

Articles 28 and 28E(3) of the 1945 Constitution provide for the rights to freedom of association, assembly, and expression. Law 21 of 2000 on Trade Unions (the Trade Unions Law) provides freedom of association and collective bargaining rights, and declares that trade unions, federations and confederations shall be free, open, independent, democratic, and responsible (Article 3).

Establishing a union

Every worker can form or become a member of a trade union (Article 5(1) of the Trade Unions Law). Unions need at least ten workers (Article 5(2)). While any number of unions

[15] Art 16C, Presidential Regulation 111 of 2013.

[16] Employers must have an occupational safety and health management system (Art 87, Labour Law).

[17] Old-age funds are paid at retirement in a lump sum and consist of contributions made by the employee and the employer. Freelance or non-salaried workers are required to contribute to old-age funds (see Government Regulation 46 of 2015 on the Administration of the Old-Age Fund Program). Old-age pensions, meanwhile, are only paid to salaried employees, and are provided monthly after retirement (see Government Regulation 45 of 2015 on the Administration of Old-Age Pensions).

[18] Presidential Regulation 109 of 2013 on Stages of Participation in the Social Welfare Program.

[19] Government Regulation 44 of 2015 on the Administration of Workplace Accident and Life Insurance Programs; Government Regulation 45 of 2015 on the Administration of Old-Age Pensions; and Government 46 of 2015 on the Administration of the Old-Age Fund Program.

can form within a single enterprise, individual workers can belong to only one (Article 14). New unions must be registered with the local office of the Department of Manpower (Article 18(1)).[20]

Unions can form federations, which are groups of at least five unions (Article 6(2)). Federations can then form confederations, which are groups of at least three federations (Article 7). Unions, federations, and confederations can affiliate or cooperate with international trade unions or other international organizations (Article 26).

Rights and functions

A registered trade union can negotiate an enterprise bargaining agreement with management; represent workers in industrial disputes and labour institutions; improve workers' welfare; and perform other employment-related activities (Article 25(1)). It must protect and defend members' rights and further their interests; improve the welfare of members and their families; and be accountable to members for its activities (Article 27).

Non-interference

By law, unions are to be free from pressure or intervention from employers, the government, political parties, or other third parties (Article 9). Article 28 prohibits:

- termination of employment;
- suspension, demotion, or transfer;
- non-payment or reduction of wages;
- any form of intimidation; and
- campaigning against the establishment of unions

where it is done to obstruct a worker who wishes to:

- form or not form a union;
- become or not become a union official;
- become or not become a union member; or
- perform or not perform union activities.

Enforcement of trade union rights and sanctions

Violation of Article 28 attracts imprisonment of between one and five years, a fine of Rp 100 million to Rp 500 million, or both (Article 43). Despite these sanctions, anti-union behaviour by corporations in breach of the law remains common.[21] While unions and union members have filed complaints alleging violations with police, only a few have been seriously investigated and even fewer prosecuted. We know of only one case that has resulted in a guilty verdict: the *PT King Jim Indonesia* case.[22] The police's lack of familiarity with

[20] To register a union, written notification must be submitted, including: the names of founding members; its constitution, regulations, and official positions; and the names of individuals occupying those positions (Art 18(2), Trade Unions Law). Once the union is registered it will receive a registration number not later than three weeks after notifying the Department of formation (Art 20, Trade Unions Law).

[21] LBH Jakarta, *Mundurnya Demokrasi dan Kalahnya Negara Hukum: Catatan Akhir Tahun Refleksi Hukum dan HAM Indonesia* (Lembaga Bantuan Hukum Indonesia 2016).

[22] 'Melawan Modus Baru Pelarangan Berserikat' *Kompas* (27 April 2012) <http://tekno.kompas.com/read/2012/04/27/02240240/melawan.modus.baru.pelarangan.berserikat>; Michele Ford, 'Employer Anti-Unionism in Democratic Indonesia' in Tony Dundon and Gregor Gall (eds), *Global Anti-Unionism: Nature, Dynamics, Trajectories and Outcomes* (Palgrave Macmillan 2013).

Article 43 and many unionists' inexperience in reporting such matters to the police appear to account for this failure, in part at least. Further, successful prosecution of an employer under Articles 28 and 43 cannot provide relief to employees who have suffered loss or have lost their jobs because of their employers' crimes.

Industrial action and the right to strike

Indonesian workers have the right to strike but this right is limited by procedural conditions set out in the Labour Law, discussed below. Article 143 prohibits anyone from preventing workers from legally, in an orderly and peaceful manner, exercising the right to strike. Employers must not replace, sanction, or retaliate against workers striking legally (Article 144). Workers who strike for fulfilment of legally guaranteed rights are entitled to full pay (Article 145).

Requirements for legal industrial action

Strikes may only take place after failed negotiations (Article 137), and the employer and local Department of Manpower office must be notified seven days before the action (Article 140(1)). Under Article 4 of Law 2 of 2004 on Industrial Dispute Settlement, if negotiations fail, the parties must lodge an industrial dispute with the local Department, and within seven days the Department must 'offer an agreement to settle through conciliation or arbitration' (Article 4(3)). If the parties do not choose between conciliation and arbitration within seven days, they will be referred to a mediator. While these dispute settlement processes are underway, striking is prohibited.

Strikes in sectors affecting the public interest and services where striking could endanger human lives, such as hospitals and fire departments, must be organized so that they do not compromise public interest or safety (Article 139). Strikes that violate this article are illegal (Article 142).

The Labour Law does not recognize solidarity strikes but they do take place. On 3 October 2012, for example, a major national strike involved about 2 million workers.[23] This strike resulted in a 44 per cent increase in the Jakarta minimum wage.[24] Although not on the same scale, similar demonstrations have been held annually over the past few years.[25]

Terminations for participation in strikes

Courts have taken different views about what constitutes 'failed negotiations', thereby creating 'uncertain legal terrain' for workers facing dismissal for striking.[26] In a survey of Bandung, Jakarta, Medan, and Surabaya industrial relations court decisions, Caraway found an overwhelming judicial trend to side with employers in such cases, usually by regarding strikes as legal in only a very narrow set of circumstances.[27]

[23] 'Indonesia Factory Workers on Strike for More Pay' *BBC News* (3 October 2012).

[24] Kanupriya Kapoor and Fathiya Dahrul, 'Indonesia Capital Raises Minimum Wage by 11 Percent amid Tepid Call for More' *Reuters* (1 November 2013) <http://in.reuters.com/article/uk-indonesia-labour-idUKBRE9A009520131101>.

[25] Utami Diah Kusumawati, 'Empat Juta Buruh Demonstrasi Tolak PP Pengupahan Hari Ini' *CNN Indonesia* (24 November 2015) <https://www.cnnindonesia.com/nasional/20151124070033-20-93615/empat-juta-buruh-demonstrasi-tolak-pp-pengupahan-hari-ini/>; Tom Maddocks, 'Indonesia Could Lose Foreign Investment to Workers' Pay Rise Demand: Economists' *ABC News* (1 November 2013) <http://www.abc.net.au/news/2013-11-01/indonesian-workers-strike-demand-increase-in-pay/5065170>.

[26] Teri L Caraway, *Final Report: Labor Courts in Indonesia* (American Center for International Labor Solidarity 2011) 16.

[27] ibid.

Collective bargaining agreements

Collective bargaining agreements (CBAs) must set out the respective rights and obligations of employers and employees (Article 124 of the Labour Law). Employment contracts made by employers must comply with existing CBAs, which must be reviewed every two years, with an option to extend for a further year (Article 123).

CBAs are made through deliberations between the employer and employee representatives (Article 116). If the negotiating parties agree to the CBA, they sign and lodge it with the relevant local office of the Ministry of Manpower (Article 132). If they cannot agree on the terms of the CBA, negotiations can proceed using an industrial relations dispute settlement process (Article 117).

Representation in negotiations

To negotiate in the interests of workers, a union must be supported by 50 per cent of workers in the relevant workplace (Article 119 of the Labour Law). Multiple trade unions within a single workplace can form coalitions to meet this threshold (Article 120).

Special categories of workers

Child labour

Generally, employing children is prohibited (Article 68 of the Labour Law). The age of a child is not defined in the Labour Law but a 2003 Ministerial Decision defines a child as any person aged less than eighteen years.[28] However, limited 'light' employment of children between thirteen and fifteen years is permitted, if for no longer than three hours and provided their schooling and development, whether physical, mental, or social, is not impeded (Article 69). Violation of this prohibition attracts one to four years' imprisonment and/or a Rp 100 million to Rp 400 million fine (Article 185).

Companies are prohibited from involving children in 'the worst kinds of work' (*pekerjaan-pekerjaan yang terburuk*) (Article 74(1)), which the Labour Law defines as all types of work that could be classed as: slavery or similar; work that exploits, makes available, or offers children for sex work, pornography, or gambling; work that exploits, makes available, or involves children in production and trade of alcohol, narcotics, psychotropics, or other addictive chemicals; and other work that endangers the health, safety, and morals of children (Article 74(2)).

Decision KEP. 235 /MEN/2003, meanwhile, states that children aged fifteen years or over may perform work, unless it is a prohibited type of work (Article 3). The list of prohibited work is extensive and includes working: with machinery or equipment (including sewing and weaving machines); in physically dangerous conditions (such as extreme temperatures or heights, with steam or electricity); with dangerous chemicals, biological substances, or dangerous animals; at sea; or in places that might harm their morals, such as bars, massage parlours, or selling alcohol or cigarettes. Companies must not make children work overtime (Article 4). Children aged fourteen or older can work as part of the education curriculum or a government-authorized training programme (Article 70 of the Labour Law).

Women workers

Employers of women on night shifts must meet special obligations, including providing security and transport (Article 76), besides those concerning leave discussed above.

[28] Art 1, Ministerial Decision KEP. 235 /MEN/2003 on the Types of Work that Could Endanger the Health, Safety and Morals of Children.

Foreign workers

Foreign workers can be employed in Indonesia but only in certain positions and for restricted periods (Article 42(4) of the Labour Law). Employers wanting to hire foreign workers must first obtain permission from the Minister of Manpower (Article 42(1)). To this end, employers must explain: the need for foreign workers; their proposed position and occupation; and the duration of their employment. Employers must also nominate an Indonesian worker as an associate to whom the foreign worker will transfer expertise (Article 43(2)).

A 2014 Ministerial Regulation dictates that for every foreign worker, a company must employ ten local staff. However, this requirement does not apply to: directors, commissioners, or board members; those employed for emergency work; short-term contract workers; or directors of artistic or sports events.[29] They must have an appropriate educational background for the role they are performing, and at least five years of work experience.[30] A 2012 Ministerial Regulation prohibits foreign workers from working in particular roles, mostly in the services sector, and the ministry has issued other regulations that specify the types of positions foreigners can hold in specific sectors. [31]

Besides the workforce laws and regulations, foreign workers must also obtain a residency or temporary stay permit and these permits require a letter of recommendation from the relevant sectoral ministry. Any employer who hires a foreigner without ministerial approval faces criminal sanctions of one to four years' imprisonment and/or a fine of Rp 100 million to Rp 400 million (Article 185).

Foreigner work permits are notoriously difficult to obtain because the many cumbersome bureaucratic processes involved create long delays and opportunities for corruption. At the time of writing, the Minister of Manpower, Hanif Dhakiri, had just announced that a new system would be developed to create an easier, faster online application process for foreign workers that would improve coordination between ministries involved and reduce corruption. He claimed permits could even be issued in as little as two days. There was, however, no clear indication of when this new system might be launched.[32]

Finally, specific provisions apply to the employment of foreign lawyers and these are discussed in Chapter 6.

Flexible employment arrangements

Sub-contracting

Employers can engage a contractor—that is, a worker without the status, rights, and duties of an employee—if the work:

- is performed under a written contract (Article 65(1));
- is distinct from the core activities of the business (Article 65(2)(a));

[29] Art 3, Ministerial Regulation 16 of 2015 on Using Foreign Workers, as amended by Ministerial Regulation 35 of 2015 on Using Foreign Workers.

[30] Art 36(1), Ministerial Regulation 16 of 2015 on Using Foreign Workers, as amended by Ministerial Regulation 35 of 2015 on Using Foreign Workers.

[31] Minister of Manpower Regulation 40 of 2012 on Positions that Cannot Be Held by Foreign Workers; Minister of Manpower Regulation 357 of 2013 on Positions that Can Be Held By Foreign Workers in the Apparel Industry; Minister of Manpower Regulation 359 of 2013 on Positions that Can Be Held By Foreign Workers in the Non-machine Metal Industry; Minister of Manpower Regulation 14 of 2015 on Positions that Can Be Held By Foreign Workers in the Furniture Industry; Minister of Manpower Regulation 15 of 2015 on Positions that Can Be Held By Foreign Workers in the Footwear Industry.

[32] Mustiani Lestari, 'Kemnaker Sebut Proses Surat Izin Perkerja Asing Bisa Cuma 2 Hari' *Detikfinance* (14 March 2018) <https://goo.gl/e13MLK>.

- is completed under the direct or indirect instruction of the employing company (Article 65(2)(b));
- supports the work of the company as a whole (Article 65(2)(c)); and
- does not otherwise inhibit production (Article 65(2)(d)).

The sub-contracted party must be a legal entity (Article 65(3)). If these conditions are not met, the contractor will be deemed an employee. The enterprise that engages the contractor must then give the contractor all the rights and entitlements of an employee (Article 65(8)). In January 2012, the Constitutional Court in the *Outsourcing Workers* case[33] struck down labour law provisions that had allowed short-term contracts between sub-contracting or outsourcing companies and their employees. This decision has since been supported by Minister of Manpower Regulation 19 of 2012 on the Terms of Outsourced Work to Another Company. Now sub-contracting companies must provide their employees with an ongoing, rather than fixed-term, employment contract unless their employment contract provides a transfer undertaking of protection of employment. Under such an undertaking, if a sub-contracting company is replaced by another, the new company employs the existing employees with existing seniority.

In practice, it is uncertain how outsourcing companies can guarantee its employees unlimited term employment when their own contracts are inevitably fixed-term. Nevertheless, if employees are denied their rights, they may file a claim with the Industrial Relations Court.

Short-term contract workers

Employment can be fixed-term or ongoing (Article 56). For fixed-term employment, the term can be a particular time frame or completing a particular task. Fixed-term contracts can only be used for work that is: one-off, temporary, or seasonal; predicted to be complete within three years; or relates to new products, activities, or supplementary products (Article 59).

Workers can be hired on a daily basis for less than twenty-one days in one month without being deemed an employee. However, workers who do this for three or more consecutive months are deemed an ongoing employee.[34]

Employees hired on an ongoing basis can be employed on a trial or probationary basis for up to three months. They cannot be paid below the award wage during this time (Article 60).

Termination

An employee's dismissal must be approved by an industrial relations court unless the:

- employee is still within a trial period (Article 154(a));
- employee freely resigns (Article 154(b));
- employment contract ends (Article 154(b)); or
- employee reaches retirement age (Article 154(c)) or dies (Article 154(d)).

In other cases, the employer must notify the relevant trade union or employee, and discuss a dismissal plan prior to approaching the Industrial Relations Court (Article 152).

The Labour Law provides for termination with and without cause.

[33] Constitutional Court Decision 27/PUU-IX/2011.

[34] Art 10, Ministerial Decision 100 of 2004 (Kep. 100/Men/VI/2004) on Requirements for Short Term Contracts.

Termination with cause

This type of termination can result from an employee's violation of the employment contract, a company regulation, or both (Article 161 of the Labour Law) but only if the employer has warned the employee by letter three times. For termination purposes, each letter 'expires' after six months unless: otherwise stated in the company regulations or relevant collective bargaining agreement; or a further warning letter is received.

A second ground for termination previously applied: gross wrongdoing or major fault by the employee (Article 158). The Constitutional Court revoked this ground in November 2004.[35]

Termination without cause (no-fault termination)

Employers can dismiss employees without cause if the status or ownership of the enterprise changes, such as through a merger (Article 163). They can also terminate employees if the enterprise experiences two years of consecutive losses, *force majeure* (Article 164), or bankruptcy (Article 165).

Termination by employee

An employee can apply for termination if: battered, humiliated, or intimidated; forced to undertake work outside the employment agreement; asked to do work that endangers life, safety, health, morality, or is illegal; not paid on time for three consecutive months; or the employer fails to fulfil its responsibilities to the employee (Article 169).

Severance pay

Severance pay is calculated based on the employee's years of service and the reasons for termination. For most dismissals, the usual amount ranges from one month's pay for those employed for less than one year, to nineteen months' pay for workers employed for over twenty-four years (Article 156). Employees terminated with cause are still entitled to severance pay (Article 161(3)).

Indonesia has relatively high severance pay levels, which some commentators say makes dismissing employees difficult, especially for employers who need to lay off staff to reduce outgoings.[36] Others, however, argue that high severance pay rates must be considered in the context of the 'absence of public unemployment benefits and the general vulnerability of workers in a labour surplus economy'.[37] In any case, a 2012 World Bank study found compliance with severance pay requirements is very low. Only a third of workers reported receiving severance pay, and most of them collected only 40 per cent of what they were owed.[38]

Bankruptcy and priority of payment: the position of employee wages

If an enterprise is declared bankrupt or liquidated, the Labour Law provides that payment of employees' wages takes priority over other debts (Article 95(4)). In practice,

[35] Constitutional Court Decision 012/PUU-I/2003.

[36] See, for example, Chris Manning, 'Labour Regulation and the Business Environment: Time to Take Stock' in M Chatib Basri and Pierre van der Eng (eds), *Business in Indonesia: New Challenges, Old Problems* (Institute of Southeast Asian Studies 2004) 244.

[37] Luke Arnold, 'Labour Law and Practice in Post-Soeharto Indonesia' in T Lindsey (ed), *Indonesia: Law and Society* (2nd edn, Federation Press 2008) 522.

[38] Vera Brusentsev, David Newhouse, and Wayne Vroman, *Severance Pay Compliance in Indonesia* (World Bank 2012).

however, this provision is often ignored.[39] This was in part because, contradictorily, Law 37 of 2004 on Bankruptcy and Suspension of Debt Payments provides that obligations to the state, auction houses, and government legal entities should be prioritized. In 2013, the Constitutional Court resolved this inconsistency in favour of employees, unless there are secured creditors.[40]

Labour inspections

The 2000 Trade Union Law requires enterprises to submit to labour inspections to guarantee freedom of association and trade union rights (Article 40). These are conducted by city and county-level inspectors, overseen by provincial-level inspection units and the national Directorate General of Labour Inspection under the Ministry of Manpower. Inspectors provide reports to the minister about workplace accidents or illnesses, and violations of labour laws.[41]

The efficacy of this system is questionable, given insufficient coordination between the regional and central governments; and lack of infrastructure and facilities.[42] The total number of inspectors is also inadequate. By the end of 2014, only 359 of 514 counties and cities had labour inspectors. Indonesia had 1,774 labour inspectors, responsible for overseeing 265,209 companies. The Ministry of Manpower estimated it needed at least another 2,600 inspectors.[43] The existing inspectors are overwhelmed with work. According to *Investor Daily*, for example, in 2012, the twenty-five inspectors in Bekasi, West Java, were responsible for overseeing about 3,500 businesses.[44] This heavy workload leads to low levels of inspection at best and, at worst, encourages inspectors to accept bribes to leave companies uninspected.

Labour dispute resolution

Before 2006, industrial disputes were regulated by Law 22 of 1957 on Labour Dispute Settlement. This statute established extensive government control over resolving industrial disputes, emphasizing 'consensus building'—that is, imposing the will of the government—in the process. This statute was replaced by Law 2 of 2004 on Industrial Relations Dispute Settlement (the Industrial Disputes Law), which also established a new system of industrial relations courts, designed to provide legal certainty and limit government intervention.[45]

Dispute resolution procedures

The Industrial Disputes Law establishes a multi-stage dispute settlement system. It divides disputes into four categories, all of which fall within the jurisdiction of the

[39] 'Upah Buruh Harus Didahulukan Dalam Kepailitan', *Hukumonline* (12 September 2014) <http://www.hukumonline.com/berita/baca/lt5412a9f00ba43/upah-buruh-harus-didahulukan-dalam-kepailitan>.

[40] Decision 67/PUU-XI/2013; Juanda Pangaribuan, 'MK Pastikan Hak Pekerja dalam Kepailitan' *Hukumonline* (9 February 2015) <http://www.hukumonline.com/berita/baca/lt54d87b9cbe1da/mk-pastikan-hak-pekerja-dalam-kepailitan-broleh--juanda-pangaribuan->.

[41] Art 179, Labour Law; Art 2, Ministerial Decision 9 of 2005 on Procedures for Reporting the Monitoring of Labour.

[42] ILO, 'Fact Sheet on Labour Inspection in Indonesia' (2011) <http://apirnet.ilo.org/resources/factsheet-on-labour-inspection-in-indonesia>.

[43] 'Pengawas Ketenagakerjaan Setelah UU Pemda Baru' *Hukumonline* (23 March 2015) <http://www.hukumonline.com/berita/baca/lt550fc5bd931d7/pengawas-ketenagakerjaan-setelah-uu-pemda-baru>.

[44] 'Indonesia Krisis Jumlah Pengawas Tenaga Kerja' *Investor Daily* (23 October 2012).

[45] Kosuke Mizuno, 'The Rise of Labor Movements and the Evolution of the Indonesian System of Industrial Relations: A Case Study' (2005) 43(1) *Developing Economies* 190.

Industrial Relations Court: disputes about rights, interests, dismissals, and inter-union issues (Article 2).

Parties to a dispute must attempt negotiations before making an official complaint. If these negotiations yield an agreement, it can be lodged with the Industrial Relations Court. If no resolution is achieved after thirty days, negotiations are considered to have failed and the dispute can be taken to the local labour department (Articles 3 and 4(1)). The parties can then mediate, conciliate, or arbitrate. Conciliation is offered for interest-based disputes, dismissals, and inter-union issues, while arbitration is available for interest-based disputes or inter-union issues (Article 4(3)–(6)). As mentioned, if the parties do not choose conciliation or arbitration, they will be automatically directed to mediate (Article 4(4)). In practice, however, most parties choose mediation.[46]

If no agreement is reached after mediation, the mediator proposes a resolution that the parties can accept or reject (Article 13(2)). If either party rejects the mediator's recommendations, they can then apply to the Industrial Relations Court, attaching evidence demonstrating that mediation has been attempted (Article 14). This Court is the final avenue to resolve interest and inter-union disputes. Disputes involving substantive rights and terminations can be appealed to the Supreme Court.

The Industrial Relations Court

The composition of the Industrial Relations Court differs significantly from its predecessors, the P4 Committees (Committee for the Resolution of Labour Disputes, or *Panitia Penyelesaian Perselisihan Perburuhan*). These included 'first instance' committees at the regional level, and a national committee that heard appeals against decisions made at the regional level.[47] Under the 1957 Labour Dispute Law, these committees were to be led by a Labour Ministry official, and included four officials from other ministries, and workers and employers. However, in practice, all members tended to be Labour Ministry officials.[48]

Panels in the Industrial Relations Court, meanwhile, comprise a career judge and two ad hoc judges,[49] each appointed by the Court's chief judge (*hakim ketua*).[50] The Court has been criticized for its decision-making quality and, in particular, for failing to apply key principles of the new Industrial Disputes Law. Some commentators argue that the court has taken a legalistic-formal approach, imposing strict procedural requirements on workers and complicated conditions on representation that obstruct the participation of unions and employers' associations.[51] They are also said to order workers to pay court fees, even though the Industrial Disputes Law prohibits this.[52] This can be a major barrier for workers, given

[46] For an overview of the conciliation and arbitration procedures, see Kosuke Mizuno, 'Strengths and Weaknesses in Law 2 of 2004 about Industrial Dispute Resolution' (2008) 9 *Labour and Management in Developmen*t 1.

[47] See Law 22 of 1957 on Resolution of Labour Disputes.

[48] ED Hawkins, 'Labor in Developing Countries: Indonesia' in Bruce Glassburner (ed), *The Economy of Indonesia: Selected Readings* (Equinox Publishing 2007).

[49] An 'ad hoc judge' is a non-career judge, that is, a judge appointed from outside the judiciary rather than from within in it, as is the norm in Indonesia. For more on ad hoc judges and judicial appointments, see the next note and Chapter 4.

[50] Ad hoc judges must be at least thirty years of age, have at university degree, and at least five years of industrial relations experience (Art 64, Industrial Relations Court Law). Candidate judges are proposed by unions and employers' associations, agreed to by the Minister for Manpower, and appointed by the chief justice of the Supreme Court. Ad hoc judges are appointed for a period of five years, extendable by one year (Art 67(2)). While serving, they must not work as a civil servant, police or military officer, lawyer, mediator, conciliator, arbitrator, political party executive, union official, or office-bearer within an employer association (Art 66).

[51] S Tjandra, *Pengadilan Hubungan Industrial di Indonesia, Quo Vadis? Berberapa Catatan Awal Dari Ruang Sidang* (Seri Kajian TURC, Jakarta 2006).

[52] ibid.

that most trials require between eight and fifteen hearings.[53] Another criticism of the new system is simply that it takes far too long to deliver outcomes. The long path 'from bipartite negotiations to mediation, trial … cassation appeal to the Supreme Court, and then a reconsideration hearing (PK) before a final and legally binding decision is made … can take up to 10 years'.[54]

According to the International Labour Organization (ILO), one of the most important changes the new Law brought was shifting jurisdiction for industrial relations disputes from the Ministry of Manpower and Transmigration to the Supreme Court.[55] While it may seem logical for the new Industrial Relations Court to be part of the judiciary rather than the executive branch, it has not improved the quality of industrial relations dispute resolution. In fact, the contrary seems to be true. This is, in part, because the Supreme Court appears to have little relevant knowledge—and perhaps even interest—in industrial relations. It has, therefore, not enthusiastically helped shape new labour law jurisprudence.

It is also because, as discussed in Chapters 4 and 14, the Supreme Court suffers from entrenched corruption and weak legal discipline, both of which seem to be contagious. Many of those involved in industrial relations—on both the employer and employee sides—have also complained about ad hoc judge performance, noting their generally poor understanding of relevant substantive law, legal logic, and court procedure. Many also believe that corruption now plays a part in many decisions of the Industrial Relations Court, with the Anti-Corruption Commission (*Komisi Pemberantasan Korupsi*, KPK) having arrested at least one of its judges for taking bribes.[56]

In fact, the reputation of the Court has become so bad that some unions and civil society groups have even called for a return to the former state-led model, arguing that for all its serious flaws, the old 'P4' system was often fairer and provided more predictable outcomes than the Industrial Relations Court. Quite apart from corruption and competence concerns, some now suspect that the Court has been captured by employers: it has 'too often prioritised the interests of business owners … and workers are often left on their own to battle it out with powerful employers'.[57] At the time of writing, the national legislature has placed amendment of the Industrial Relations Law on its list of priority bills (Prolegnas). However, it had not released a draft for discussion, so it was unclear whether major reform of the Court is proposed.[58]

[53] Herlambang Wiratman, 'Why is the Industrial Relations Court Failing Workers?' *Indonesia at Melbourne* (2017) http://www.indonesiaatmelbourne.unimelb.edu.au/why-is-the-industrial-relations-court-failing-workers/.

[54] ibid.

[55] ILO, *Indonesian Supreme Court and ILO Improving the Capacity of Industrial Relations Court Judges* (2012) <http://www.ilo.org/jakarta/info/public/pr/WCMS_180479/lang--en/index.htm>.

[56] Judge Imas Dianasari of the Bandung Industrial Relations Court was found guilty of accepting a bribe to rule in favour of an employer, Onamaba Indonesia. See Wiratman (n 53).

[57] ibid. [58] ibid.

18

Foreign Investment

INTRODUCTION

Indonesia is considered a generally attractive site for investment, both foreign and domestic, at least in terms of potential. It has abundant natural resources, including silver, tin, copper, gold, and coal, and is a leading producer of palm oil, timber, and rubber. Despite some uncertainty about minimum wages, which differ from province to province, Indonesia's labour market remains largely competitive with its regional neighbours. Indonesia also has a large, growing, internal market. Some estimate that Indonesia's middle class is currently somewhere between 40 and 74 million and that this number will roughly double by 2020 or 2030.[1]

However, Indonesia is generally thought to have failed to reach its economic potential. Despite being the world's fourth most populous nation, Indonesia has only the sixteenth largest economy. Consistent growth of almost 6 per cent for much of the Soeharto regime and over the past decade led various international commercial organizations to project that it would become one of the world's top five economies within the next few decades.[2] Over the past few years, however, economic growth has slowed to about 5 per cent, although this is high by world standards.[3] Various international financial institutions, and even the Indonesian government itself, recognize that without increased foreign investment, the more ambitious predictions of Indonesia's economic rise may not materialize. In short, Indonesia attracts insufficient foreign direct investments to meet its now pressing infrastructure needs, or to increase employment and export-led growth.[4] While Indonesia's population comprises 40 per cent of ASEAN, it attracts only one-third of the investment of its much smaller neighbour, Singapore.[5] This is hardly surprising, given the numerous reports that portray Indonesia's investment climate in a negative light. International investors often complain of legal uncertainty, the complicated decentralized decision-making process, a growing environment of economic nationalism, and immigration barriers.[6] The World Bank's Doing Business 2017 indicators ranked Indonesia ninety-first out of 190

[1] Boston Consulting Group and McKinsey have made these estimates, although both have been are criticized for attributing middle class status to groups with low purchasing power: see Joanne Sharpe, 'Meet Indonesia's Middle Class' *Lowy Interpreter* (19 February 2014) <http://www.lowyinterpreter.org/post/2014/02/19/Meet-Indonesias-middle-class.aspx>.

[2] For example, the IMF estimates that Indonesia will be the fifth largest economy by 2030; Citibank that it will become the fourth largest by 2040; and McKinsey Global that it will become the seventh largest by 2030: Abdul-Latif Halimi, 'The Regional Implications of Indonesia's Rise' *The Diplomat* (10 April 2014) <http://thediplomat.com/2014/04/the-regional-implications-of-indonesias-rise/>; Boris Johnson, 'Indonesia Adores the Brits, so Why Aren't We Trading There?' *Telegraph* (1 December 2014) <http://www.telegraph.co.uk/news/worldnews/asia/indonesia/11264200/Indonesia-adores-the-Brits-so-why-arent-we-trading-there.html>.

[3] See Asian Development Bank website: <https://www.adb.org/countries/indonesia/economy>.

[4] OECD, *OECD Investment Policy Reviews* (Organisation for Economic Co-operation and Development 2010) 19; 'The Unstimulating Stimulus' (2015) *Economist* <about:reader?url=http%3A%2F%2Fwww.economist.com%2Fnews%2Ffinance-and-economics%2F21674794-jokowi-administration-tinkers-margins-unstimulating-stimulus>; I Made Sentana and Ben Otto, 'Indonesia Makes Attracting Foreign Investment a Priority' *Wall Street Journal* (27 August 2015) <http://www.wsj.com/articles/indonesia-makes-attracting-foreign-investment-a-priority-1440676597>.

[5] Galih Gumelar, 'Naik 20%, Investasi Asing di Indonesia Tertinggi di Asean' *CNN Indonesia* (25 June 2015) <https://www.cnnindonesia.com/ekonomi/20150625010145-92-62208/naik-20-investasi-asing-di-indonesia-tertinggi-di-asean/>.

[6] Mervyn Piesse, 'Indonesian Investment Climate Remains Tenuous' *Future Directions* (25 March 2015).

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countries for overall ease of doing business and a lowly 166th for enforcing contracts on the same scale.[7]

The national legislature, the DPR (*Dewan Perwakilan Rakyat*), has enacted several laws in recent years, as have the national executive and subnational lawmakers, that are intended, at least partly, to improve Indonesia's investment climate for both foreign and domestic investors. This chapter discusses some of these laws, focusing on the 2007 Investment Law.

As will be seen, this Law establishes various investment incentives but has met with limited success, primarily because it has not dislodged numerous obstacles to attracting and maintaining foreign investment, including general legal uncertainty and corruption, both of which are discussed in other chapters of this book. The overarching power of the Constitutional Court to invalidate legislation for breaching the Constitution has also added complexity, not least because of its lack of enthusiasm for foreign investment, which has sometimes led it to thwart government attempts to open sectors for private sector investment or to otherwise make investing more attractive. Worse, many regulations issued after the Investment Law was enacted have undermined the attractiveness of investing in Indonesia, particularly in the mining sector, as we show through a case study in this chapter highlighting recent changes to the legal infrastructure governing that sector. Despite having a provision on arbitration, the Law has also done nothing to improve dispute resolution for investors in Indonesia. Indeed, the Indonesian government appears now willing to exclude investor–state arbitration—that is, a mechanism under which private investors can resolve their disputes with the Indonesian government by arbitration—from future bilateral investment treaties. One result has been the emergence of very public disputes between foreign investors and the Indonesian government that can only dampen investor enthusiasm. These disputes include the *Churchill* and *Newmont* cases, which we discuss later in this chapter.

These problems appear to be compounded by changes to Indonesia's political system since the fall of Soeharto. As discussed in Chapter 1, Indonesia has experimented with various democratic models and has dispersed power previously held by the president and his inner circle to other national institutions and even between tiers of government. This has made foreign investment in Indonesia much messier and more uncertain than ever before. National ministries compete for authority over particular types of investments, and local governments claim jurisdiction over investments located in their regions. The courts do little to resolve these disputes. And, in an increasingly competitive political environment, national and subnational politicians vie for popularity, often making pledges they know will be vote-getters, even though they might thereby undermine the investment climate and even trigger economic calamity. To make matters worse, corruption, including in obtaining government permits for investment, appears to have increased since *Reformasi*. The net result is 'legal uncertainty'—perhaps the most commonly heard complaint of foreign investors in Indonesia.

THE FOREIGN INVESTMENT LAW

Law 25 of 2007 on Foreign Investment was designed to make Indonesia a more competitive destination for investment, particularly by comparison to its regional rivals, Cambodia, Malaysia, and Vietnam, as well as more distant India and China. The Law seeks to increase

[7] World Bank, *Doing Business 2017: Equal Opportunity for All* (World Bank Group 2017) 8–9 <http://www.doingbusiness.org/~/media/wbg/doingbusiness/documents/profiles/country/idn.pdf>. Reports are sometimes conflicting, however. A 2017 survey of multinational business executives conducted by the United Nations Conference on Trade and Development (UNCTAD) placed Indonesia as equal fifth most favourable investment destination, up from eighth in 2016, although this may reflect its potential rather than investor experiences: UNCTAD, *World Investment Report 2017: Investment and the Digital Economy* (United Nations 2017) 9.

investment and, with it, economic growth, employment, and public welfare (Article 3(2)). Replacing Laws of 1967 and 1968 that regulate foreign and domestic investment respectively,[8] most provisions of the 2007 Investment Law apply to both foreign and domestic investors, though some are directed at foreign investment only. For our purposes, the Law covers three main areas: requirements and obligations for foreign investors; inducements to invest; and limitations on investments. We now discuss these.

Requirements and obligations

Foreigners can invest in Indonesia, but must do so through a limited liability company (*perseroan terbatas*, PT) (Article 5(2) of the 2007 Investment Law).[9] This company can be a joint venture (with Indonesians or other foreigners) or a wholly foreign-owned company, although, as discussed below, foreign ownership is capped, or even prohibited, in some sectors. Companies are classified as 'foreign capital investment companies' (*perusahaan penanaman modal asing*, PMA) if they are majority-owned by foreigners when established, or if foreigners buy a majority share in an existing PT (Article 5(3)).

To operate legitimately, PMA companies must be approved by the Indonesian Investment Coordination Board (*Badan Koordinasi Penanaman Modal*, BKPM) and report their investment activities to the Board (Article 15(c)). The BKPM coordinates investment policy among government agencies, Bank Indonesia, the central government, and regional governments, and reports directly to the president (Article 27(1) and (3)). The Board's functions include promoting investment, developing investment opportunities and partnerships, and helping resolve 'impediments' faced by investors (Article 28).

BKPM also provides investment services for investors, with the 2007 Investment Law seeking to simplify investment approval processes by establishing an integrated one-stop service centre (*Pelayanan Terpadu Satu Pintu*, PTSP) within the BKPM (Articles 25(5), and 26). The main objective here is to make things easier for investors by requiring them to lodge just one application for a licence with the BKPM, which is then supposed to approach every government agency with authority over the sector relevant to the investment for necessary approvals.[10]

The PTSP system does not, however, appear to be fully operational. In 2016, the BKPM reported that 526 of the 561 provinces, counties, cities, and special economic zones in Indonesia had established PTSPs.[11] However, they face resistance from ministries that have traditionally controlled admission of investments and refuse to hand over this authority to PTSPs, not least because of the rent-seeking opportunities such authority offers. In early 2015, President Joko Widodo sought to reignite the PTSP as part of an effort to make investment in Indonesia easier, and twenty-two ministries agreed to station representatives in the central PTSP at the BKPM.[12] However, whether this initiative can deliver concrete

[8] 1967 Foreign Investment Law and 1968 Domestic Investment Law.

[9] For discussion of Indonesian company law, see Chapter 16. By contrast, domestic investment can take any of a variety of forms, including as a sole proprietor (for which no registration is generally required); a *maatschap* (a legal entity without limited liability); a *firma* (which resembles a partnership, under which there is no limitation on liability and each member is liable for the *firma*'s debts); or a *Comanditer corporation* (which has one or more shareholders who only contribute capital and are liable only to the value of their shares).

[10] See Presidential Decision 27 of 2009. An example of this is Ministry of Environment and Mineral Resources Regulation 13 of 2017, which allows investors to obtain mining and mineral infrastructure licenses through a fast approval service offered by BKPM known as *Layanan Cepat 123J* (*Pelayanan Cepat Izin Investasi 3 Jam*, 3-Hour Fast Investment Licence Service).

[11] BKPM, 'Luar Jawa Dominasi Penghargaan PTSP' (2016) *Press Release* <http://www2.bkpm.go.id/images/uploads/file_siaran_pers/Siaran_Pers_BKPM_300516_-_Luar_Jawa_Dominasi_Penghargaan_PTSP.pdf>.

[12] BKPM, 'Penguatan Kelembagaan PTSP Pusat di BKPM Melalui Inpres No.4 Tahun 2015' (2015) *Press Release* <http://www2.bkpm.go.id/images/uploads/file_siaran_pers/Press_Release_BKPM_19032015_inpres_ptsp_

benefits for investors, and fulfil the repeated promises made by the president, still remains to be seen.

The Investment Law imposes other miscellaneous requirements. These include that investors, whether domestic or foreign:

- 'prioritise' giving employment to Indonesians (Article 10(1)) and train them (Article 10(3)), although foreign experts can be used if necessary (Article 10(2));
- ensure that their capital comes from legitimate sources (Article 16(a));
- settle their debts when winding up their investment activities (Article 16(b));
- create a climate of healthy competition, and avoid monopolistic and other practices that harm the state (Article 16(c));
- ensure the safety, health, security, and welfare of employees (Article 16(e));
- comply with the law (Article 16(f));
- protect the environment (Article 16(d)); and
- allocate funds to restore the natural environment if involved in the natural resources sector (Article 17).

Article 15 of the 2007 Investment Law also requires investors to:

- apply principles of good corporate governance (Article 15(a));
- fulfil 'social responsibilities' (Article 15(b));
- report their investment activities to the BKPM (Article 15(c));
- respect cultural community traditions at the investment site (Article 15(d)); and
- obey all laws (Article 15(e)).

The vaguely cast and highly aspirational Article 15 obligations are particularly significant for investors because Article 34(1) allows the Indonesian government to impose sanctions for breaching them. These sanctions include limiting, freezing, or cancelling investment activities. The term 'social responsibilities' in Article 15(b), widely considered equivalent to corporate social responsibility (CSR), is defined as 'the responsibility attaching to all investment companies to create harmonious, balanced and appropriate relationships/connections with the environment, values, norms or culture of the local society'. The Law provides no definitions of 'cultural traditions' or 'social responsibilities', however. With little guidance about what is necessary for compliance, many companies feel exposed to the whims of government interpretation of these requirements and understandably fear that the uncertain requirements will be used to leverage bribes.

The CSR requirements of the 2007 Investment Law have not been subject to constitutional challenge, in part because foreigners lack standing before the Constitutional Court.[13] However, an equivalent provision in the 2007 Corporations Law[14] has been reviewed by the Constitutional Court.[15] A six-judge-to-three majority found that provision did not breach the Constitution, pointing to Article 33(4) of the Constitution, which emphasizes that the economy is a collective endeavour. Far from violating the Constitution, the Court decided that mandatory CSR was a legitimate means by which the government could

pusat.pdf>; Linda Yulisman, 'Easier Investment Permits to Woo Investors' *Jakarta Post* (27 January 2015) <http://www.thejakartapost.com/news/2015/01/27/easier-investment-permits-woo-investors.html>.

[13] This was made clear in Constitutional Court Decision 2-3/PUU-V/2007, in which Scott Rush, an Australian prisoner on death row, was denied standing to challenge the statute under which he was sentenced to death, Law 35 of 2009 on Narcotics, because he was not an Indonesian citizen.

[14] Art 74, Law 40 of 2007 on Limited Liability Companies.

[15] Constitutional Court Decision 53/PUU-VI/2008.

compel companies to contribute to community economic development, as is in fact required by Article 33(4). Following this decision, Government Regulation 47 of 2012 on Corporate Social and Environmental Responsibility was issued, which provides greater clarity on mandatory CSR for firms operating in the natural resources sector. This is discussed in Chapter 16.

Inducements and facilities

The 2007 Investment Law provides several guarantees to both domestic and international investors. Article 8(3), for example, pledges free repatriation of capital, profit, income, funds to buy raw or other types of materials, and the like (Article 8(3)).[16]

Other guarantees are qualified or nebulous. For example, Articles 4(2)(a) and 6(1) grant equal treatment to both domestic and foreign investors. Both articles make this equal treatment subject to the 'national interest' but that concept is not defined, leaving it susceptible to subjective determination by the government. (As discussed below, the scope for foreign investment in various sectors is primarily governed by a presidential regulation that prohibits or restricts foreign investment in various sectors.) Indeed, the Law itself states, in Article 4(2)(c), that the government is to provide 'opportunities for the development and protection of micro, small and medium sized enterprises, and cooperatives'. In other words, the government appears to have authorized itself to provide unequal treatment to help develop and protect these domestic entities. Article 6(2) provides another qualification. It states that 'equal treatment' need not be given to foreign investors from a country that has obtained special rights through a treaty with Indonesia. This appears to permit the Indonesian government to give a 'special right' to investors from countries with which it has entered into trade agreements.[17] This appears to mean that investors from countries with which Indonesia has no agreement might be excluded from these 'special rights', thereby suffering unequal treatment compared to those from countries that do.

Another example of a qualified right is in Article 7(1). This provision states that the government 'will not nationalise or takeover ownership rights of investors'.[18] Article 7(1) itself creates an exception, however, apparently authorising nationalisation or takeovers effected 'by statute'. Article 7(2) then establishes that if the government nationalizes or takes over assets, it 'will pay compensation based on market rates'. If the government and investor cannot agree upon the amount of compensation, they can seek arbitration (Article 7(3)). While Article 7(1) is far from a guarantee against nationalization or expropriation, it does prevent the executive government from nationalising or expropriating on a whim. Legislative approval, in the form of a statute (*undang-undang*), must first be obtained and, unlike executive processes, would likely be preceded by public debate.

The Law gives investors the right to legal certainty, business certainty, and security for the life of the investment (Article 4(2)(b)). These rights are restated in Article 30(1), which requires Indonesia's central and local governments to guarantee certainty and security

[16] Although this assurance is significantly qualified by Art 9(1), which provides that if the investor has not met one of its legal obligations, the Minister of Finance or an investigator can request a bank or other institution to delay the transfer or repatriation and a court can order the delay. The Bank is not permitted to transfer or repatriate the funds until the investor has met its obligations.

[17] These 'special rights' include those relating to customs, free trade, common markets, monetary unions and similar institutions, and to agreements between Indonesia and foreign governments, whether bilateral, regional or multilateral, which cover that special right in the implementation of investment. See elucidation to Art 6(2), Investment Law.

[18] A similar guarantee was provided to foreign investors under Art 21, 1967 Foreign Investment Law. Under Soekarno, the government had, in fact, formally nationalized Dutch assets after the Dutch government refused to relinquish West Papua. The national legislature achieved this by enacting Law 86 of 1958 on Nationalisation of Dutch Assets.

(*kepastian dan keamanan*) to investors. These certainty and security protections are once again granted in Article 14, which states that all investors have the right to:

a. certainty about rights, law, and protection;
b. free information about the field of endeavour in which they are operating;
c. service; and
d. facilitation facilities in accordance with the law.

Despite its restatement, this 'right' to legal certainty is largely a legal mirage, for two reasons. First, legal certainty is defined in the elucidation to Article 14 as the guarantee that: 'law will be the primary foundation of every action and policy for investors'. On this definition, the right to legal certainty does not 'add' anything to what the government must already do: follow its own laws. This is implicit in Indonesia being a *negara hukum* (law state)—a concept discussed in Chapter 1. On this reading, the right to legal certainty is superfluous.

Second, as discussed in Chapters 2 and 3 of this book, Indonesia's legal system is dysfunctional, with many different lawmakers claiming authority to issue laws on particular matters and enacting inconsistent laws, and the courts lacking 'complete' jurisdiction to determine which inconsistent law prevails over the others. Legal uncertainty is thus inherent within the legal system itself. It, therefore, cannot be guaranteed simply by repeated assertions in the 2007 Investment Law.

Facilities

The Investment Law also provides 'facilities' or incentives to investors who either make new investments or expand their investments and either:

- absorb many employees;
- operate in a high-priority field, a 'pioneer' industry, or a particularly isolated region;
- develop infrastructure;
- transfer technology or engage in research and development;
- protect the environment;
- partner with small or medium enterprises, or cooperatives; or
- use capital goods, machines, or equipment produced domestically (Article 18(1) and (3)).

The facilities to which these investors are entitled include:

- reduced income, land, and building taxes;
- import duty exemptions for capital goods and raw materials that cannot be produced domestically;
- accelerated depreciation or amortization (Article 18(4));
- improved ease of services or licensing in obtaining land rights (Articles 21(a) and 22);
- immigration services for foreign workers (Articles 21(b) and 23); and
- improved ease of obtaining import licences (Articles 21(c) and 24).

Perhaps most controversially, the 2007 Law also sought to allow investors to obtain various rights for long periods over land they needed for their investments (Articles 21(a) and 22). Although the Law stopped short of allowing foreigners to obtain freehold title, it allowed them, and domestic investors, to obtain various other land rights, such as to lease, build, and to use. Foreigners could already obtain these rights under existing laws for an initial term (between twenty-five and thirty-five years, depending on the right) and could then

seek an 'extension' (of between twenty and thirty years).[19] The 2007 Investment Law allowed investors to obtain this initial grant, the extension, and a further extension 'upfront' (*di muka*), if their investment met certain conditions.[20] Article 22(1) allowed foreigners to obtain the rights to:

- cultivate (*hak guna usaha*) for up to ninety-five years (sixty years, with an upfront further extension of thirty-five years);
- build or use buildings (*hak guna bangunan*) for eighty years (fifty years with an upfront further extension of thirty years); and
- to use or harvest (*hak pakai*) for seventy years (forty-five years plus an upfront further extension of twenty-five years).

In 2007, a coalition of NGOs successfully challenged the constitutionality of these provisions of the Investment Law allowing upfront extensions. The Constitutional Court decided that the extensions breached Article 33(3) of the Constitution, which, as discussed later in this chapter, requires the state to control natural resources for the greatest benefit of the people.[21] For the Court, granting these upfront extensions constituted a relinquishment of this control for an excessive period. Critics of the decision pointed out that the upfront extensions did not affect the state's ability to exercise control, because the government could revoke the grant if the investor abandoned the land, damaged the public interest, used or exploited the land contrary to the purpose for which it was granted, or otherwise breached land laws (Article 22(4)).[22]

Restrictions

Since the mid-1980s, Indonesia has progressively increased the level of foreign ownership permitted in investments in various sectors.[23] In principle, both foreigners and Indonesian nationals are now permitted to invest in any sector of the economy, unless they are excluded from doing so, or conditions are imposed on their participation.[24] The 2007 Investment Law sets general parameters for what types of investments are permitted in broadly categorized sectors. The so-called 'negative list', issued every few years in the form of a presidential decision to implement the Investment Law establishes these prohibitions and conditions in specific sectors and sub-sectors. At the time of writing the negative list was contained in Presidential Regulation 44 of 2016.

Some sectors are closed to foreign investment altogether. Article 12(2) of the Investment Law, for example, prohibits foreign investment in weapons and explosives production. Article 12(3) states that sectors can be closed to investment on grounds of health, morality, culture, environment, defence and security, and other national interests.

The 2016 Regulation categorizes business fields as open, closed, or conditionally open (Article 2(1) of Government Regulation 44 of 2016). Conditionally open fields include:

- Business fields that are conditionally open, but are reserved for micro, small, and medium enterprises or cooperatives, or in partnership with these businesses.
- Business fields that are open provided certain conditions are met. These conditions include:

[19] For discussion of land law and the interests in land that foreigners can obtain, see Chapter 8.

[20] These included that the investment: was long term; increased the competitiveness of the Indonesian economy; did not require excessive land; and did not harm the public interest (Art 22(2)).

[21] Constitutional Court Decision 21-22/PUU-V/2007.

[22] 'MK Hapus Frase di Muka Sekaligus' *Hukumonline* (25 March 2008).

[23] OECD (n 4) 45.

[24] Art 3, Presidential Regulation 44 of 2016 on Business Fields that Are Closed and Conditionally Open to Investment ('The Negative Investment List').

- foreign ownership capped at a certain percentage of equity in the investment;
- the investment being in a specific location or a special licence obtained;
- 100 per cent of the investment being domestic; and
- the foreign investor being from an ASEAN member state (Article 2(2)).

The list of closed and conditionally open sectors is long, so we only provide several examples of listed sectors here. Closed sectors include marijuana cultivation and casinos (which are prohibited under Indonesian law in any event) and manufacture of certain industrial chemicals. Conditionally open sectors include the following:

- Plantations of many crops, including oil palm, of less than twenty-five hectares are reserved for micro, small, and medium enterprises. Foreign investment in oil palm plantations of twenty-five hectares or more is capped at 95 per cent, and the 'nucleus' estate must source at least 20 per cent of its production from smallholders.
- Foreign investment in telecommunications services and internet service providers is limited to 67 per cent.
- Foreign investment in offshore oil and gas drilling is limited to 75 per cent.
- Foreign investment in pharmaceutical manufacturing businesses is capped at 85 per cent.
- Advertising is open to foreign investment, but only to investors from ASEAN member states, and foreign ownership is capped at 51 per cent.
- Investment in banks, including foreign exchange banks, non-foreign exchange banks, shari'a banks, money brokers, and foreign exchange traders is open, but requires operational licences.

This 2016 Regulation increased permitted foreign ownership percentages in many sectors and opened some sectors that were previously closed or conditionally open. Examples of previously closed or conditionally open sectors that are now completely open include:

- film production studios and facilities;
- bars, restaurants, cafes, and sports facilities; and
- toll road management.

We note that foreign investors cannot legally circumvent ownership caps by contracting with an Indonesian party to hold ownership on their behalf. This is because the Investment Law prohibits beneficial ownership. That is, investors may not invest on behalf of third parties under a nominee arrangement (Article 33(1)). Such arrangements are invalid and unenforceable (Article 33(2)).[25]

THE CONSTITUTIONAL COURT

The Constitutional Court has limited private sector involvement in various sectors by relying on Article 33(2) and (3) of the Constitution, which state:

> (2) Branches of production that are important to the state, and that affect the public's necessities of life, are to be controlled by the state.
> (3) The earth and water and the natural resources contained within them are to be controlled by the state and used for the greatest possible prosperity of the people.

[25] See also Head of BKPM Regulation 13 of 2017, which repeats this and enables BPKM to require investors to provide a notarized statement to confirm they are not party to a nominee arrangement. See also p. 147, above, regarding nominee arrangements relating to land.

In several decisions, the Court has invalidated statutory provisions—even entire statutes—that have allowed the state to relinquish 'control' over natural resources, including land, forests, coastal resources, oil, natural gas and water, and important public utilities, such as electricity.[26] The Court has held even that a government agency established to regulate and monitor the oil and gas sector was unconstitutional because its statutory functions were insufficient to constitute 'control' of the sector.[27] In the Court's view, these statutes granted excessive control to the private sector, domestic and foreign, thereby violating either Article 33(2) or (3).

These cases have turned on the meaning of 'control' in Article 33(2) and (3), which the Court has interpreted conservatively. In the first Constitutional Court decision about the meaning of 'control', the Court decided that 'control' was not simply the power to regulate, because the state already had inherent power to do this.[28] It also was not mere civil ownership, given that Article 33 declared that the state must exercise its control to ensure the greatest possible collective prosperity.[29] Rather, Article 33 required the state to exercise control by making policies, administering, regulating, managing, and supervising important sectors and natural resources.[30] For natural resources at least, these five activities needed to be performed for one purpose: the greatest prosperity of the people.[31]

Before 2012, the Court had not indicated whether some of these five activities comprising 'control' were more important than others. It appeared that the state needed to perform all of them to maintain its control. However, in the *Oil and Natural Gas Law* case (2012), a majority of the Court declared that direct management was 'the most important first order form of state control'.[32] Indeed, the Court hinted that if the government was unable to perform all five activities, then direct management might suffice.[33] The Court held that to meet its 'control' obligation, the state must directly manage natural resources unless it lacks capacity or capital to do so, in which case it can invite private sector participation. For the Court, direct state management, at least of natural resources, was necessary to ensure the 'greatest possible prosperity of the people': if the private sector was involved, then the state would have to share profits with it, therefore reducing the amount that could be allocated to furthering that prosperity.[34] Critically, however, the majority then decided that the state had relinquished its control over the oil and natural gas sector by not directly managing the sector, without clearly addressing whether the state had sufficient capital or

[26] Simon Butt and Tim Lindsey, *The Indonesian Constitution: A Contextual Analysis* (Hart 2012). In its very first case, decided in 2003, the Court invalidated an entire statute that sought to regulate and privatize aspects of the electricity industry: Simon Butt and Tim Lindsey, 'Economic Reform When the Constitution Matters: Indonesia's Constitutional Court and Article 33' (2008) 44 *Bulletin of Indonesian Economic Studies* 239.

[27] Constitutional Court Decision 36/PUU-X/2012.

[28] Simon Butt and Fritz Edward Siregar, 'The BP Migas Case: Implications for the Management of Natural Resources' (2013) 31(2) *Journal of Energy & Natural Resources Law* 107.

[29] *Oil and Natural Gas Law* case (2012) para [3.11].

[30] Constitutional Court Decision 001-021-022/PUU-I/2003. According to the Court, the government could administer by issuing and revoking licences and concessions; and it could manage through share ownership or by running the enterprise as a state institution.

[31] *Oil and Natural Gas Law* case (2012) para [3.11], citing Constitutional Court Decision 3/PUU-VIII/2010 para [3.15.4]. The Court has not, to our knowledge, specified from where it derived these five activities, or even whether they are the Court's own creation. For a convincing suggestion that the Court may have been influenced by the writings of German jurist Wolfgang Friedmann, see Mohamad Mova Al Afghani, 'The Elements of "State Control"' *Jakarta Post* (14 January 2013).

[32] *Oil and Natural Gas Law* case (2012) para [3.12]. The Court did not explain why direct management was more important than any of the other four activities, even though it is arguable that, using its regulatory power, for example, the state could effectively directly manage by comprehensively regulating the sector, and strictly monitoring compliance, so that industry participants function just as the state would have sought to do if it participated directly.

[33] *Oil and Natural Gas Law* case (2012) para [3.13.4].

[34] Of secondary importance were, equally, policymaking and administration. Both regulation and monitoring fell within the third tier.

capacity to manage the sector itself.[35] The majority also did not consider whether private sector involvement might create profits that, even if shared, would be larger than if the state had directly managed the activities itself.

It follows that the state does not exercise control within the meaning of Article 33(2) and (3) by contracting with the private sector to manage important industries or exploit natural resources, or by issuing concessions or rights over natural resources. The control must be continuing and unimpeded. In the *Oil and Natural Gas Law* case (2012), for example, the Court expressed concern about the government contracting with the private sector, observing that these contracts 'degraded the sovereignty of the nation over natural resources', if they impeded the government exercising control over important sectors or natural resources for the prosperity of the people.[36] The Court was also concerned that, if a dispute emerged between a foreign investor and the government about that contract, the dispute might be resolved by international arbitration,[37] which would be costly and, depending on the outcome, might result in the state losing control of an Article 33(3) resource.

Similarly, in the *2007 Investment Law* case, discussed above, the Court held that allowing upfront extensions to land rights to the private sector, particularly foreigners, constituted state relinquishment of its 'control' over land—a natural resource within the meaning of Article 33(3). For the Court, if the state grants land rights to private sector operators, it must have absolute discretion to refuse to extend those rights after their initial expiry.

These decisions have caused disquiet among investors in Indonesia, both foreign and domestic, who are now uncertain about the extent to which they can be legitimately involved in important or natural resource-related industries. The uncertainty is compounded by the Court's failure to discuss what constitutes 'direct management' and, in the *Oil and Natural Gas* case itself, to transparently assess whether the state had the capacity or capital to engage in exploration and extraction. Although, as discussed in Chapter 4, Indonesia has no formal system of precedent, the Constitutional Court has sought to follow its previous decisions in Article 33 cases. The Court, therefore, will almost certainly apply its decision in the *Oil and Natural Gas Law* case (2012) to other types of Article 33(3) cases and to the important sectors covered by Article 33(2). Some Islamic and non-governmental organizations have already begun lodging constitutional challenges against other legislation on Article 33 grounds.[38] As part of this so-called 'Constitutional Jihad', these groups successfully challenged Law 7 of 2004 on Water Resources[39] and have identified a further 115 laws that, in their view, breach Article 33(2) and (3), that they plan to challenge in the Constitutional Court.[40]

If this happens, then the Court is likely to require the state to directly manage important industries and natural resources, preferably through a state-owned enterprise. Only if this enterprise lacks capital or capacity to operate the sector itself can the state contract with others, including the private sector. Even then, the state might need to reserve the right to

[35] Compare dissenter Justice Hardjono's view, which was that whether the state had the capacity and capital for direct management was a matter for the president and the national legislature, who know more about these matters than the Court.

[36] *Oil and Natural Gas Law* case (2012) para [3.13.3]. Again, compare the dissent of Justice Hardjono. For him, because Indonesia is a 'law state' (*negara hukum*), it cannot simply use its power over national resources as it deemed fit once it had entered into such a contract.

[37] As required by Arts 1(23), 4(3), and 44, 2001 Oil and Natural Gas Law, for example.

[38] The *Oil and Natural Gas Law* case itself was brought by ten Islamic organizations and thirty-two individual applicants, led by Din Syamsuddin, General Chair of Muhammadiyah, Indonesia's second largest Islamic organization, boasting almost 30 million members.

[39] Constitutional Court Decision 85/PUU-XI/2013. This decision cancelled the entire Law, and resurrected its predecessor: Law 11 of 1974 on Water.

[40] These include the 2007 Investment Law, Law 30 of 2009 on Electricity, and Law 24 of 1999 on Foreign Exchange: 'Judicial Review, Jalan Terakhir "Jihad Konstitusi" ' *Hukumonline* (8 May 2015).

resume control at its discretion—even during the contract period, if the 'people's prosperity' so requires. In any event, non-state involvement will presumably be limited to making up any shortfall of capital or expertise that the state cannot provide, even if the private sector can promise better efficiencies than the government.[41] However, it remains unclear who, in practice, assesses whether the state has sufficient capital or capacity. Presumably this must be the state, which has the best access to information needed to do this. Nevertheless, the Constitutional Court has not, in its published reasons, considered whether the state has made this assessment. It seems content to presume that the state has contracted with the private sector without considering any potential consequences for public welfare.

Another possibility is that, in future decisions, the Court will prevent the state committing to arbitration to resolve disputes about important industries and natural resources. Following the logic of the *2007 Investment Law* case, the Court might even prohibit long-term contracts with the private sector, which grant excessive control over those industries and resources exploitation. While the Court does not have direct jurisdiction over contracts or general government commitments to arbitration, if such contracts or commitments are authorized by statutory provisions, then the Court is likely to strike down those provisions.

One saving grace for foreign investors is that the Constitutional Court's decisions operate prospectively, so that any contracts entered under statutory provisions that the Court later invalidates will remain valid. The Court usually makes declarations to this effect in its decisions.[42]

CASE STUDY: MINING SECTOR INVESTMENT

The Indonesian archipelago boasts significant reserves of natural resources—particularly coal, tin, copper, nickel, and gold. Many of the world's largest mining companies operate there, including Freeport (primarily in Papua), Newmont (Sumbawa), Vale (Sulawesi), and BHP Billiton (Kalimantan). Indonesia relies heavily on mining to support its economy, with mining contributing around 20 per cent to Indonesia's total gross domestic product (GDP).[43]

In 2009, the DPR enacted a new Mining Law (Law 4 of 2009 on Mineral and Coal Mining). This Law introduced a new regime of mining permits or licences—IUP (*Izin Usaha Pertambangan*, or Mining Business Licenses)—that the government can issue to mining enterprises, whether foreign or domestic (including regional and national state-owned enterprises). The 2009 Mining Law replaced a 1967 Mining Law, which did not provide for a permit or licensing system. Rather, it established a 'contract of work' system under which the minister appointed mining companies as contractors to carry out mining activities on behalf of the state. Domestic miners could either negotiate a contract of work or obtain a mining permit.

Under the 2009 Law, mayors and *bupatis* (heads of sub-provincial 'counties') can issue mining licences over mining areas that fall within their cities or counties; governors over mining areas that fall within their provinces or cross cities or counties; and the minister over mining areas that cross provinces (Article 37). The minister can also issue licences for foreign investors. Unfortunately, this fragmented system has resulted in many overlapping IUPs, with

[41] 'Cadangan Minyak dan Gas Bumi Bertambah' *Kompas.com* (13 March 2013) <http://cetak.kompas.com/read/2013/03/13/02523637/cadangan.minyak.dan.gas.bumi.bertambah>.

[42] The Court has, in a handful of cases, given decisions retrospective effect but not in these 'important industries' and 'natural resources' cases. See Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Brill 2015).

[43] Sascha Winzenried and Fandy Adhitya, 'Challenging Times Ahead for the Indonesian Mining Sector' *Jakarta Post* (27 February 2014).

regents, governors, and ministry officials sometimes awarding IUPs over the same areas to different miners or awarding an IUP over an area already being used for another type of enterprise, such as a palm oil plantation.[44] Of course, this might be an error, caused primarily by the lack of a common map showing all the licences awarded by the various tiers of government. However, the cause of many overlaps is likely to be more sinister, with officials using their licensing powers to obtain kickbacks from applicants.

A licence can be issued for only one type of natural resource; separate applications must be filed if the entity wishes to extract more than one resource from the site (Article 40). An exploration mining licence must be obtained to survey, explore, and conduct feasibility studies (Articles 42–45) and a mining production operating licence for mine construction, mining, processing, refining, and transportation for sale (Articles 46–49).[38] Mining production operating licences can last for up to twenty years, after which they can be twice extended by ten years (Article 47).

The 2009 Mining Law was not well received by many mining companies and they cited two primary concerns. The first was that it required mandatory divestment of foreign ownership in mining operations to the national or regional government, a state-owned enterprise (national or regional), or an Indonesian company after five years of production (Article 112(1)). However, the Law specified neither the precise percentage of divestment nor whether further divestment must take place. The second concern was that the new Law prohibited minerals being exported without being processed to specified purity levels (Articles 103(1) and 170)—that is, it required onshore processing. These two issues are now explained in more detail.

Divestment

Government Regulation 24 of 2012 was issued to implement the new Mining Law and was amended by Government Regulation 1 of 2017. These regulations require majority or wholly foreign-owned companies holding mining licences in Indonesia to progressively divest a majority share of the company from the sixth year of production so that by the end of the tenth year a majority share has been divested.

Over the years, different levels of divestment have been required of foreign investors, for example, though the contracts of work that governed most resources projects. The 2017 Regulation requires, however, that an Indonesian participant in a mining venture must own:

- 20 per cent of the foreign company after the sixth year of production;
- 30 per cent after the seventh year;
- 37 per cent after the eighth;
- 44 per cent after the ninth; and
- 51 per cent or more after the tenth year (Article 97(2)).

Failure to divest according to this schedule can lead to suspension of production and even revocation of the mining licence.

The 2017 Regulation specifies 'Indonesian participants' in the following order of priority as purchasers of these shares: central government; provincial government; city or county government; national state-owned enterprise; regional state-owned enterprise; or national company. Critically, the share is not offered at market price. Rather, it is an 'appraisal price' based on the costs of establishing the enterprise.

[44] Bernadetta Devi and Dody Prayogo, *Mining and Development in Indonesia: An Overview of the Regulatory Framework and Policies* (Centre for Social Responsibility in Mining 2013).

So, for example, in 2016, after years of uncertainty, Newmont reluctantly divested its 48.5 per cent interest in the local company running the Hatu Hijau copper and gold mine in Sumbawa.[45] This followed years of disputes with the government about the divestment, and even debate within the government about whether the executive could purchase shares without legislative authority.[46] This general concern to reduce foreign ownership in mining enterprises is also reflected in Government Regulation 77 of 2014, which caps foreign ownership of new IUPs at 75 per cent and at 60 per cent if the enterprise carries out its own processing or refining activities. For existing IUPs, the regulation imposes the same cap if the shareholding of a company holding an exploration licence changes.

Onshore processing

The second concern about the Mining Law was that it prohibited minerals being exported after 2013 without being processed to specified purity levels (Articles 103(1) and 170). This requirement, the Law stated, was imposed in the context of 'adding value' to natural resources (Article 102). Foreign miners were, again, reluctant to act, given that onshore processing would require large investments to build smelters. As the 2014 deadline loomed, it became clear that most miners would be unable to comply.

Realizing the dire economic consequences of prohibiting exports, the government instead issued a regulation that temporarily reduced the purity threshold, allowing export of semi-processed minerals, such as copper, iron, and lead, provided the mining entity concerned obtains ministerial approval and intends to set up processing facilities.[47] The Finance Ministry issued corresponding regulations that progressively increase export duties to 'encourage' construction of processing plants.[48]

Analysis

Commentators have explained these changes as symptoms of resource nationalism, which appears to be politically popular. Government officials claim that these changes allow Indonesians to more readily compete and participate in extractive industries and that more of the benefits of Indonesian natural resources stay in Indonesia. As Warburton puts it:

> The logic is that foreign companies have exploited Indonesia's resources for too long and it is now time to create more space for Indonesians to extract their country's riches. The aspirations underpinning these policies are self-sufficiency and economic sovereignty.[49]

The economic consequences of these policies are likely to be disastrous, with investment levels and production plummeting.

This came into sharp relief in March 2017, when Freeport-McMoRan pushed back against onshore processing (which would have required Freeport to build a US$2.9 billion smelter) and divestment, by freezing its operations at its Grasberg mine in Mimika, West Papua—the world's biggest gold mine. Freeport maintained that it has a contract that

[45] Sara Schonhardt, 'Newmont Mining Leads Foreign Exit from Indonesia' *Wall Street Journal* (1 September 2016).

[46] Agus Sahbani and Mahinda Arkyasa, 'Government Authority Dispute in Newmont Divestment Continues' *Hukumonline* (9 May 2012).

[47] Government Regulation 1 of 2014 and Finance Ministry Regulation 6 of 2014. The Regulation did not capture nickel, bauxite, tin, gold, silver, and chromium, which require full refinement before export.

[48] Finance Ministry Regulation 6 of 2014.

[49] Eve Warburton, 'Jokowi and the New Developmentalism' (2016) 52 *Bulletin of Indonesian Economic Studies* 297, 297. See also the discussion of the Constitutional Court's interpretation of Article 33 of the Constitution—the 'People's Economy' provision—earlier in this chapter.

runs until 2021, so it need not comply with these regulations but the Mining and Energy Ministry disagreed, saying it must open itself to renegotiation.[50]

Freeport's contribution to the local economy is undeniable: the mine employs over 30,000 people; provides around 90 per cent of the area's GDP; runs hospitals; and provides scholarships for students.[51] Agreement could not be reached, and Freeport laid off thousands of workers, triggering a series of strikes that began in May 2017. In early 2018, negotiations were still underway, seemingly making slow progress and confirming Indonesia's international reputation as a difficult destination for investors.

ARBITRATION

As mentioned in Chapter 4, the professionalism of Indonesia's judiciary is often brought into question. Although judicial integrity is an oft-mentioned concern, so too is competence to handle commercial matters, particularly complex cases. Most well-advised foreign investors therefore include arbitration clauses in the contracts they agree to with Indonesian partners, whether private sector or government. In this way, they can avoid using Indonesia's courts to resolve disputes and, instead, have them resolved using either domestic or international arbitration. Of course, arbitration is also available to help resolve disputes between Indonesian parties.

In 1999, Indonesia's first statute dedicated to alternative dispute resolution, including arbitration, was enacted: Law 30 of 1999 on Arbitration and Alternative Dispute Resolution. Prior to this Law, Indonesian courts usually recognized arbitration clauses by reference to the Code of Civil Procedure and Article 1338 of the Civil Code, which states that 'All agreements made in accordance with statute apply like statutes to those who made them'. This meant that the courts could hold parties to their contracts, including any agreements to arbitrate if a dispute occurred. Statutes governing the Supreme Court have, since 1950, declared that parties cannot appeal an arbitral decision to that court.[52]

Enforcement of arbitral awards, particularly foreign awards, has been problematic, even though Indonesia ratified the ICSID Convention in 1968 and the New York Convention in 1981.[53] Indonesian courts, including the Supreme Court itself, have been reluctant to enforce such awards, primarily due to confusion, first, about whether these Conventions had become part of Indonesian law through ratification and, second, about how enforcement would take place, given that no procedures had been produced to guide them.[54] Only after the Supreme Court issued a regulation in 1991 containing such procedures did recognition and enforcement of foreign arbitral awards begin.[55] However, enforcement still proved difficult in some cases, and the Indonesian courts developed a reputation for interfering in awards rather than simply enforcing them. For example, in the infamous Decision 499/Pdt/VI/1988 *(E.D & F. Man (Sugar) Ltd v Yani Haryanto* case, the Supreme Court avoided enforcement of a London arbitral award by deciding that the contract containing the arbitration clauses was void. The contract, and its agreement to arbitrate, could therefore no longer be enforced.

At the time of writing, the recognition and enforcement of arbitral awards was governed by the 1999 Arbitration and Alternative Dispute Resolution Law. Although not without flaws, this statute has helped make recognition and enforcement of arbitral awards, both

[50] Krithika Varagur, 'Showdown in Indonesia Brings World's Biggest Gold Mine to Standstill' *Voanews* (27 February 2017).

[51] ibid.

[52] See, for example, Law 1 of 1950 on the Supreme Court and Law 1 of 1967 on Foreign Investment both cited in Tony Budidjaja, 'Arbitration in Indonesia' in Shahla F Ali and Tom Ginsburg (eds), *International Commercial Arbitration in Asia* (Juris 2013) 187–88.

[53] Ratification, respectively, by Law 5 of 1968 and Presidential Decision 34 of 1981.

[54] See, for example, Supreme Court Decision 2944/K/Pdt/1983 (29 November 1984).

[55] Supreme Court Regulation 1 of 1990 on Procedures for the Enforcement of Foreign Arbitral Awards.

domestic and international, more reliable than previously. The Law applies to arbitration specifically anticipated in a clearly expressed written agreement to arbitrate signed by the parties, or agreed to after the dispute arises (Articles 1(1), 2, 4(2), and 9). This agreement to arbitrate authorizes an arbitrator to make binding decisions concerning the rights and obligations of the parties (Article 4(1)). Only commercial disputes can be arbitrated (Article 5(1)).

Parties can choose domestic or international arbitration (Article 34(1)) and can choose the governing law to resolve their disputes (Article 56(2)). The parties can choose their preferred arbitral procedures, though the Law outlines procedures the parties are to use if they do not (see Articles 27–51). The main national arbitration institution is *Badan Arbitrase Nasional Indonesia* (BANI—Indonesian National Board of Arbitration, now also known as BANI Arbitration Center), established in 1977 by the Indonesian Chamber of Commerce and Industry (Kamar Dagang dan Industri Indonesia, KADIN). Compared to the judiciary, however, BANI hears very few disputes. According to its chairman, Husseyn Umar, for example, BANI resolved just 470 cases between 1999 and June 2016.[56] Many companies, Indonesian and foreign, prefer to arbitrate outside of Indonesia, usually in Singapore, given its proximity to Indonesia and strong reputation for professional dispute resolution.

The choice of whether to arbitrate domestically or internationally affects how any resulting award is enforced. The Law establishes different procedures for the registration and enforcement of domestic awards compared with international awards. Domestic awards must be registered with the registrar of the relevant district court by the arbitrator(s) or proxy within thirty days of the award being handed down (Article 59(1)).[57]

Before ordering execution, the district court chief judge must be satisfied that the parties agreed to arbitrate; that the dispute between them is 'commercial'; and that the award does not 'violate morality and public order' (Articles 4, 5, and 62(2)). If any of these conditions are not met, or Article 59(1) is not followed, then the award is unenforceable (Article 59(4)). Once registered, however, the award binds the parties and cannot be appealed (Article 60 and its elucidation). If one party refuses to comply with the award, the chief judge can enforce it, upon the request of the other party (Article 61). The award will be enforced as if it were a civil judicial decision (Article 64). This is by no means a guarantee of quick or easy enforcement, however. Some problems surrounding judicial enforcement, including delays, are discussed in Chapter 4.

By contrast, only the Central Jakarta District Court can recognize and enforce international awards. The Law does not establish time limits within which applications for registration must be lodged, although registration is required by the arbitrator(s) or proxy (Article 67). Again, to be enforceable, they must relate to 'commercial law'[58] and not violate public order (Article 66(c)). The Law imposes two additional requirements for international awards. First, they must have been handed down by an arbiter or tribunal in a country which is a party to an international agreement about the recognition and enforcement of international awards to which Indonesia is also a party (Article 66(a)).[59] Second, the award must have an exequatur (certificate of approval) from the Supreme

[56] 'Jasa Konstruksi Dominasi Sengketa di BANI' *Media Indonesia* (14 September 2016) <http://mediaindonesia.com/news/read/66780/jasa-konstruksi-dominasi-sengketa-di-bani/2016-09-14>. Smaller bodies have been established to provide arbitration services for various types of disputes but they tend to hear even fewer cases than BANI.

[57] Although it seems that the courts are willing to allow either of the parties to seek to register the award: Timur Sukirno, Andi Yusuf Kadir, and Reno Hirdarisvita, 'Indonesia', in *The Baker & McKenzie International Arbitration Yearbook 2011–2012* (Baker & McKenzie 2014).

[58] By reference to Indonesian law, which includes trade, banking, finance, investment, industry, and intellectual property (Art 66(b) and its elucidation).

[59] This must be evidenced by a statement from an Indonesian diplomatic representative in the country where the award was issued.

Court of Indonesia (for international awards involving the Indonesian state as a party) or the Central Jakarta District Court chief judge (for other international awards) (Article 66(d) and (e)).

A refusal to recognize and enforce any award can be appealed to the Supreme Court (Article 68(2)), which has ninety days to decide the appeal (Article 68(3)). A Central Jakarta District Court chief judge decision that recognizes and orders the enforcement of an international award cannot be appealed (Article 68(1)). Once the chief judge has ordered enforcement of the award, the order is conveyed to the district court with jurisdiction over the place of the debtor's domicile or assets for implementation in accordance with Indonesian civil procedural law.[60]

Challenging arbitral awards

Critically, a district court has no jurisdiction to adjudicate a dispute involving parties already bound by an arbitration agreement (Article 3). This is reinforced in Article 11, which states:

> (1) The existence of a written arbitration agreement eliminates the rights of the parties to submit the resolution of the dispute or difference of opinion contained in the agreement to the District Court.
>
> (2) The District Court must refuse and must not interfere in any dispute settlement which has been determined by arbitration, except in particular cases determined in this Law.

However, the 1999 Arbitration and Alternative Dispute Resolution Law also allows the relevant Indonesian court to annul a domestic or foreign award on three alternative fraud-related grounds:

1. The documents used during the arbitration hearing are later discovered to be false.
2. After the award has been made, a document that would have been decisive but was hidden by one party is discovered.
3. The award was made based on deception by one party to the dispute (Article 70).

In 2014, the Constitutional Court invalidated the elucidation to Article 70, which required that the existence of these types of fraud be proved in separate judicial proceedings.[61] The Supreme Court had long refused to entertain annulment claims without such a judicial decision.[62] It seems that parties can now seek to prove fraud during proceedings for the annulment of an award.

While Article 70 appears to cast these three grounds as an exhaustive list, the General Elucidation to the 1999 Arbitration and Alternative Dispute Resolution Law does not. It refers to these grounds 'among others' that are not specified.

An annulment application must be lodged with the chairperson of the relevant district court within thirty days of an award's registration (Articles 71 and 72(1)). Annulments can then be appealed to the Supreme Court (Article 72(3)).

We note that the Law also seeks to close off a particular avenue for judicial interference, employed by the Supreme Court in the Decision 499/Pdt/VI/1988 *(E.D & F. Man (Sugar) Ltd v Yani Haryanto* case, discussed above. Article 10 provides that agreements to arbitrate are severable from the main contract in which those agreements are contained. This provision means

[60] Karen Mills, 'Enforcement of Arbitral Awards in Indonesia' (2000) 3(5) *International Arbitration Law Review* 192.

[61] Constitutional Court Decision 15/PUU-XI-2014.

[62] Supreme Court Decisions 01/Arb.Btl/2006; 855K/lPdt.Sus/2008; 729/K/PDT.SUS/2008; 109/K/PDT.SUS/2010, cited in Constitutional Court Decision 15/PUU-XI-2014, pp 46–47.

that the dispute between the parties can still be resolved by arbitration, even if the contract containing the arbitration agreement itself is of questionable validity or is, in fact, invalidated.

Judicial enforcement of arbitral awards

The circumstances in which an Indonesian court can refuse to recognize an arbitral award on public order grounds are uncertain. The Law does not define 'public order', which is thought to leave significant scope for subjective judicial determination to declare awards adverse to the government as violating public order.

Even more contentious is whether an award can be annulled on public order grounds. On the one hand, Article 70's annulment grounds appear, as mentioned, to be cast as an exhaustive list and do not mention public order. On the other, as noted above, the general elucidation to the Law refers to these grounds 'among others' that are not specified. This is legally controversial, because, as discussed in Chapter 2, an elucidation must not 'add' to or fundamentally alter the text of the statute it purports to elucidate. By appearing to leave the permissible grounds for annulment open, the elucidation appears to do precisely this.

Commentators have different views about the extent to which the courts avoid recognizing, or annul, arbitral awards in today's Indonesia. Some emphasize that most awards are now enforced as a matter of course and that these exceptions are rarely used.[63] Others point to several decisions in which awards have not been enforced or have been annulled and conclude that, unfortunately, there is 'great uncertainty as to the ambit of these exceptions and how the Indonesian courts will apply them'.[64]

Yet others still have argued, quite bluntly, that Indonesia's courts are 'hostile' towards enforcing foreign arbitral awards.[65] There is some merit in these claims. The Supreme Court has, for example, in various cases, decided that arbitral awards about a contractual dispute cannot be enforced on public order grounds if related litigation about the dispute is pending before Indonesian courts.[66] For example, in *Astro Nusantara International BV v PT Ayunda Prima Mitra*,[67] the Supreme Court held that public order was breached by an anti-suit injunction, issued by arbitrators, prohibiting the parties from pursuing litigation because their dispute was captured by an arbitration clause in their contract. The Court appeared to take this as an affront to Indonesian sovereignty rather than as an order directed at the parties. Most notorious, perhaps, was the *Karaha Bodas* case,[68] which involved enforcement of an arbitral award, issued in Switzerland, adverse to an Indonesian state-owned enterprise. The Central Jakarta District Court held that the General Elucidation to Article 70 allowed it to annul an award for violating public order and did so, on the basis that a state-owned enterprise should not be held accountable for Indonesian regulatory changes.[69]

On the other hand, some notorious cases, including *Karaha Bodas* itself, have been overturned by the Supreme Court on appeal. In other words, although lower courts have

[63] Karen Mills, 'Debunking the Myth: Enforcement of Foreign Arbitral Awards in Indonesia' *Lawyer Issue* (22 May 2015) <http://www.lawyerissue.com/debunking-the-myth-enforcement-of-foreign-arbitral-awards-in-indonesia/>.

[64] Todung Mulya Lubis and Maurice Burke, 'Int'l Arbitration Developments in RI' *Jakarta Post* (10 December 2004); Tony Budidjaja, *Public Policy as Grounds for Refusal of Recognition and Enforcement of Foreign Arbitral Awards in Indonesia* (Tatanusa 2002); Budidjaja (n 52).

[65] Fifi Junita, 'Experience of Practical Problems of Foreign Arbitral Awards Enforcement in Indonesia' (2008) 5 *Macquarie Journal of Business Law* 369.

[66] Central Jakarta District Court Decisions 01 Pdt/Arb.Int/1999/PN.Jkt.Pst and 02/Pdt/Arb.Int/1999/PN.Jkt.Pst.

[67] 01/K/Pdt.Sus/2010, 24 February 2010.

[68] This case is discussed at length in Noah Rubins, 'The Enforcement and Annulment of International Arbitration Awards in Indonesia' (2004) 20 *American University International Law Review* 359.

[69] Central Jakarta District Court Decision 86/Pdt.G/2000/PN.JKT.PST.

resisted recognition or enforcement in some cases, those seeking enforcement often ultimately prevail. However, one significant problem remains: it appears still to be common for parties losing in arbitration proceedings to oppose enforcement before Indonesia's courts, even if they think they will probably lose on appeal.[70] The vagueness of the public policy exception is often said to be the main culprit: its lack of clarity leads some practitioners to argue that it encourages losing parties to take the chance of challenging enforcement, particularly if the award involves significant sums of money.[71]

Bilateral investment treaties and investor–state arbitration

Indonesia has signed bilateral investment treaties (BITs) with the countries listed in Table 18.1.[72]

Most of these BITs seek to encourage investment by investors of the other state party by providing: fair and equitable treatment; protection and security; most favoured nation provisions; and guarantees against nationalization or expropriation. Most of the BITs specify how investor–state disputes should be resolved. The parties should first attempt to resolve the dispute by consultation and negotiation. If this fails, then the parties can use the courts in the country where the investment is admitted, or the International Centre for the Settlement of Investment Disputes (ISCID) for conciliation or arbitration, using the procedures of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), to which Indonesia is a party.[73]

These dispute resolution processes are largely mirrored in Article 32 of the 2007 Investment Law, which states:

1. Investment disputes between the government and investors are to be first settled through deliberation and consensus.
2. If a settlement cannot be reached by deliberation and consensus, the dispute can be settled through arbitration, alternative dispute resolution or the courts, under prevailing laws.
3. Investment disputes between the Government and domestic investors are to be settled through arbitration, if the parties have agreed to do so, and if resolution is not achieved through arbitration, then the dispute is to be resolved in court.
4. Investment disputes between the government and foreign investors are to be resolved through international arbitration upon which the parties must agree.

In our view, Article 32(4) leaves scope for the Indonesian government to seek to avoid arbitration, at least if no BIT, free trade agreement, or contract otherwise provides for it. Article 32(4) does not clearly stipulate how disputes between investors and the Indonesian government should be resolved if the parties cannot agree to arbitrate, much less the seat of the arbitration and procedures. It seems possible that one party could stall arbitration by refusing to agree on the particulars, although failure to agree might simply lead to the dispute being settled by the courts via Article 32(2).

In 2014, Indonesia announced that it intended to 'terminate' *all* sixty-seven of its BITs,[74] with the president claiming that they were 'inappropriate and unjust' and the

[70] 'Putusan Arbitrase Seharusnya Dipatuhi' *Hukumonline* (31 March 2010).

[71] Budidjaja (n 64).

[72] Table adapted from United Nations Conference on Trade and Development (UNCTAD), *Investment Policy Hub, International Investment Agreements, Bilateral Investment Treaties: Indonesia* <http://investmentpolicyhub.unctad.org/IIA/CountryBits/97#iiaInnerMenu>.

[73] This paragraph draws on Simon Butt, 'Foreign Investment in Indonesia: The Problem of Legal Uncertainty' in Vivienne Bath and Luke Nottage (eds), *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge 2011).

[74] Some have argued that 'terminate' really means 'allow to lapse', indicating that Indonesia will not actively rescind, but rather will seek to renegotiate them with more favourable terms upon their expiry: Michael

Table 18.1 Countries that have signed a bilateral trade agreement with Indonesia

Partner	Date of signature	Date of entry into force	Terminated
Algeria	2000		
Argentina	1995	2001	2016
Australia	1992	1993	
Bangladesh	1998	1999	
Belgium-Luxembourg	1970	1972	2002
Bulgaria	2003	2005	2015
Cambodia	1999		2016
Chile	1999		
China	1994	1995	2015
Croatia	2002		
Cuba	1997	1999	
Czech Republic	1998	1999	
Denmark	1968 2007	1968 2009	2009
Egypt	1994	1994	2014
Finland	1996 2006	1997 2008	2008
France	1973	1975	2015
Germany	1968 2003	1971 2007	2007 2017
Guyana	2008		
Hungary	1992	1996	2016
India	1999	2004	2016
Iran	2005	2009	
Italy	1991	1995	2015
Jamaica	1999		
Jordan	1996	1999	
Korea, North	2000		
Korea, South	1991	1994	
Kyrgyzstan	1995	1997	
Laos	1994	1995	2015
Libya	2009		
Malaysia	1994	1999	2015
Mauritius	1997	2000	
Mongolia	1997	1999	
Morocco	1997	2002	
Mozambique	1999	2000	

(*continued*)

Table 18.1 Continued

Partner	Date of signature	Date of entry into force	Terminated
Netherlands	1968	1971	1995
	1994	1995	2015
Norway	1969		1994
	1991	1994	2004
Pakistan	1996	1996	2016
Philippines	2001		
Poland	1992	1993	
Qatar	2000		
Romania	1997	1999	2016
Russia	2007	2009	
Saudi Arabia	2003	2004	
Serbia	2011		
Singapore	1990	1990	2006
	2005	2006	2016
Slovakia	1994	1995	2015
Spain	1995	1997	2016
Sri Lanka	1996	1997	
Sudan	1998		
Suriname	1995		
Sweden	1992	1993	
Switzerland	1974	1976	2016
Syria	1997	2000	
Tajikistan	1994		
Thailand	1998	1998	
Tunisia	1992	1992	
Turkey	1997	1998	2016
Turkmenistan	1994		
Ukraine	1996	1997	
UK	1976	1977	
Uzbekistan	1996	1997	
Venezuela	2000	2003	
Vietnam	1991	1994	2016
Yemen	1998		
Zimbabwe	1999		

vice-president declaring that new treaties 'adjusted to recent developments' were needed.[75] What prompted the Indonesian government to seek bring these BITs to an end? At least three factors were probably at play, all related to the fact that these BITs generally allowed investors to submit a dispute with the Indonesian state to binding arbitration.

The first and second reasons are interrelated. The first was that 2014 was an election year and, as mentioned, economic nationalism is politically popular view in Indonesia, where foreigners—both pre- and post-Independence—have, for centuries, been portrayed as the primary beneficiaries of national resource exploitation. In this context, it is considered politically advantageous to advocate against foreign investors being able to pursue large amounts from the Indonesian government, particularly after they have already extracted significant amounts of Indonesia's natural resources. The second was that, in 2014, Indonesia appears to have enjoyed the highest levels of foreign investment in its history.[76] Perhaps policymakers felt that they could, therefore, afford to seek to 'terminate' these BITs. After all, any resulting controversy or economic damage could be dealt with by the new government.

The third reason was that the Indonesian government was defending itself in several arbitration proceedings, three of which were highly-publicized. Newmont filed for arbitration in 2014 with ICSID, in response to the ore export bans and pending divestments, although it ultimately withdrew this claim, apparently after securing a reduced export rate.

Perhaps the most important dispute Indonesia has faced was the *Churchill and Planet Mining* case, which was a $US2 billion claim. This was a dispute about who owned licences to mine coal in East Kalimantan. Churchill (a UK company) and Planet (Australian) had purchased shares in the Ridlatama group, which claimed have legitimately obtained coal mining licences from the East Kutai local government after the previous Indonesian licence-holder allowed them to lapse. Churchill had discovered a much larger cache of coal than expected: 2.73 billion tons. This made the site the seventh-largest undeveloped coal mining asset in the world, with potential to generate huge revenue.

The previous licence-holder, Nusantara Group, claimed that it still held the licence. For its part, Indonesia claimed that the licence had not lapsed and that the licence Churchill had presented was a forgery, detected following an audit by the National Audit Agency to verify the legitimacy of mining authorizations issued between 2006 and 2008. The audit also found that Ridlatama had not obtained permission from the Forestry Ministry to undertake mining in production forests as required under Article 38 of the 1999 Forestry Law.

Initially, Churchill's Indonesian partner, Ridlatama, pursued this case through Indonesia's administrative courts, and appealed to the Supreme Court, but failed.[77] In May 2012, Churchill then brought international arbitration proceedings against the Indonesian government—namely, the president, the East Kutai regent, the Foreign Ministry, the

Ewing-Chow and Junianto James Losari, 'Indonesia Is Letting Its Bilateral Treaties Lapse so as to Renegotiate Better Ones' *Financial Times* (16 April 2014). If this is true, then the termination announcement has little real 'bite', at least in the short term, given that most of these BITs have sunset clauses allowing them to continue in force for up to fifteen years after their formal expiry: Leon Trakman and Kunal Sharma, 'Indonesia's Termination of the Netherlands–Indonesia BIT: Broader Implications in the Asia-Pacific?' *Kluwer arbitration blog* (21 August 2014). However, it seems that Indonesia has, in fact, sought to bring some bilateral treaties to an end earlier than their expiry date, including the sunset clauses they contain: Luke Eric Peterson, 'Indonesia Ramps up Termination of BITs' *Investment Arbitration Reporter* (20 November 2015) <https://www.iareporter.com/articles/indonesia-ramps-up-termination-of-bits-and-kills-survival-clause-in-one-such-treaty-but-faces-new-600-mil-claim-from-indian-mining-investor/>.

[75] 'Boediono Meets with Netherlands PM' *Jakarta Post* (24 March 2014).

[76] Anthony Crockett, 'The Termination of Indonesia's BITs: Changing the Bathwater, but Keeping the Baby?' (2017) *The Journal of World Investment & Trade* 836–57.

[77] Samarinda District Administrative Court Decision 31/G/2010/PTUN-SMD; Jakarta Administrative High Court Decision 110/ B/2011/PT.TUN.JKT; Supreme Court Decision 367/K/TUN/2011.

Ministry of Energy and Mineral Resources, and the National Investment Coordination Board. It did so at the Washington-based International Centre for Settlement of Investment Disputes. Initially, Indonesia challenged jurisdiction because, it claimed, it had not given express consent to the investment under the UK and Australian bilateral investment treaties upon which Churchill and Planet had relied, respectively. Indonesia lost this argument in 2014, meaning that the substantive merits were heard. Indonesia won, primarily because the panel thought that the licence probably was a forgery and that Churchill's previous Indonesian partner, the Ridlatama Group, was probably responsible. This tainted the entire investment, and meant that protection under the treaties was unavailable.[78] The tribunal also noted that Churchill's due diligence investigations into the authenticity of the licences were insufficient.

Despite ultimately prevailing, it seems clear that the Indonesian government genuinely thought that it could have lost the *Churchill* case. The matter also brought home that the central government might find itself responsible for defending the actions of local governments, including paying out over US$10 million in legal fees.[79] As then-President Susilo Bambang Yudhoyono said at the time:

> This is a lesson for us, [an] incident in a county [*kabupaten*] … taken to arbitration … The first defendant, yes, the President. Imagine [a] hundred countries doing things like that, especially when we're on the wrong side and lose, it's a remarkable implication.[80]

The *Churchill* case had followed soon after the cases of *Al Warraq* and *Rafat*, who pursued Indonesia in arbitration in Singapore. They argued that the government had expropriated their investment—Bank Century, in which they were shareholders—after a corruption scandal. They also argued that they had not been treated fairly and equitably. A broader scandal involving Bank Century had consumed Indonesian politics for many months, and involved allegations of impropriety in the government bailout of the Bank. Al Warraq and Rafat were accused, with others, of embezzling some of these funds.[81] For this, they were tried in absentia in Indonesia, found guilty and sentenced to fifteen years' imprisonment. The Indonesian media portrayed them as two fugitives using arbitration to steal even more from Indonesia. Again, Indonesia ultimately won this arbitration on the merits, though the tribunal found that Indonesia had treated Al Warraq and Rafat unfairly by not allowing them to be legally represented during their trials.

There is much to suggest that, despite these statements and disputes, very little has changed, or will change, at least for most foreign investors. The ASEAN Comprehensive Investment Agreement (2009), and the ASEAN free trade agreements with Australia, New Zealand, China, Japan, Korea, and India, provide investor–state dispute settlement (ISDS) for foreign investors in Indonesia. Investors from many other countries have bases upon which to bring arbitration claims. In any event, as a matter of Indonesian law, it seems clear that disputes between the government and international investors can be settled by arbitration, based on agreement between them. This is clearly provided for in Indonesia's investment statute, as discussed. This view is further supported by a draft regulation on

[78] *Churchill Mining and Planet Mining Pty Ltd v Republic of Indonesia*, Case No ARB/12/40 and 12/14.

[79] Viriya Singgih, 'Indonesia Vindicated in International Arbitration' *Jakarta Post* (9 December 2016). In September 2012 the president resolved that disputes that stemmed from administrative decisions made by regional governments would no longer be capable of submission to the International Centre for Settlement of Investment Disputes (ICSID) (Art 1, Presidential Decision 31 of 2012 regarding Disputes Which May Not Be Submitted For Resolution Within The Jurisdiction Of The International Center For Settlement Of Investment Disputes, issued 22 September 2012). The Decision directs the Minister of Law and Human Rights to inform the ICSID of this change (Art 3).

[80] Cited in David Price, 'Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?' (2016) *Asian Journal of International Law* 124, 138.

[81] Erza Sihite, 'Be Careful Over Century Lawsuit, Indonesian Government Told' *Jakarta Globe* (6 October 2011).

investment dispute resolution between the government and investors, which confirms that foreign investors continue to have access to international arbitration under treaties and investment law.

After all, Indonesia has a good success rate in investor–state arbitration proceedings. Since Indonesia ratified ICSID in 1967, only eight ICSID claims have been referred to arbitration against Indonesia and Indonesia has only lost one, concerning the construction of a Jakarta hotel, worth less than US$3 million.[82] We expect that it might back away from its anti-ISDS rhetoric after the dust settles from these recent arbitrations and it realizes the need to attract more foreign investment, including back into the mining sector. It is also relevant that, as Indonesia's economy grows, Indonesia may find itself pushing for similar protections in the countries in which it invests, making it more difficult to maintain an objection to those protections being offered in Indonesia itself.

THE INDONESIAN INVESTMENT GUARANTEE FUND

In December 2009, the Indonesian government, by Government Regulation 35 of that year, established the Indonesia Infrastructure Guarantee Fund (IIGF) as a state-owned company with a capital base of US$100 million, which it manages as liquid assets. The IIGF exists to issue financial guarantees to investors in the form of an agreement negotiated and signed by both the IIGF and the investor and, in some cases, the government of Indonesia. This is intended as an incentive for investors to participate in public-private partnerships (PPP), that is, joint projects in which private sector investors build, develop and/or operate infrastructure that the government needs and, in most cases, will eventually own. The IIGF guarantee is intended to provide security to investors who fear that the government will be unwilling to make good their losses if the PPP project fails—for example, if the government reneges on its support for the project. The IIGF agreements therefore expressly state the value of liabilities that arise if a risk is realized.[83]

The establishment of the IIGF was supported by the World Bank and is a direct response to arbitrators' awards in the two *Himpurna* cases.[84] These were ad hoc arbitrations under the UNCITRAL arbitration rules that took place in Jakarta soon after Soeharto's fall in 1998, and resulted in decisions that were very critical of Indonesia and its legal system as well as huge payments to Himpurna, a subsidiary of CalEnergy Inc. In the first case, Himpurna sued the state electricity company PT (Persero) Perusahaan Listrik Negara (PLN), claiming breach of a thirty-year energy sales contract entered into by Himpurna, PLN, and the state oil company, Pertamina, in 1994.

Under this agreement, Himpurna explored for geothermal energy and built four energy-generating plants—Dieng 1, 2, 3, and 4—from which PLN would purchase electricity. Himpurna completed Dieng 1, but when the Asian Financial Crisis struck in 1997, PLN refused to pay for electricity it had received and presidential regulations were issued

[82] Crockett (n 76); Timothy G Nelson, 'Investor–State Arbitration and Investment Treaty Protection—The South-East Asian Angle' (2009) 28 *Australian Resources and Energy Law Journal* 213. Indonesia has, however, lost other non-ICSID arbitrations, including the *Himpurna* ad hoc dispute, discussed on this page, which led to a decision that was very critical of Indonesia and its legal system, and a damages award against Indonesia of $392 million.

[83] This section on the IIGF draws on Dudi Rulliadi, *Public-Private Partnerships and the Transformation of the Third World State: The Case of Indonesia* (University of Melbourne 2017).

[84] *Himpurna California Energy Ltd (Bermuda) v PT. (Persero) Perusahaan Listruik [sic] Negara (Indonesia); Himpurna California Energy Ltd. v Republic of Indonesia*, Interim Award and Final Award, 26 September 1999 and 16 October 1999. For details, see 'Himpurna California Energy Ltd (Bermuda) v PT. (Persero) Perusahaan Listruik Negara, Final Award, 4 May 1999', *Yearbook of Commercial Arbitration 2000, Volume XXV* (Wolters Kluwer 2000) <http://www.kluwerarbitration.com/document/IPN22006>.

'postponing' Dieng 1, 2, and 3 indefinitely and placing Dieng 4 'under review'.[85] The arbitrators found for Himpurna and ordered PLN to pay it damages of $392 million, stressing the need for a market-friendly 'direct payment' mechanism in government guarantees. At this time, 'compensation payments could only be dispensed through time-consuming and rigid state budget procedures or litigation'.[86]

The arbitrators in the first *Himpurna* case condemned the Indonesian legal system generally, saying: '[g]iven the important place Indonesia occupies in the world stage, the relative deficiencies of the country's legal framework stand in stark and unfortunate contrast—as though an eagle had to live with the wings of a sparrow'.[87] The tribunal noted that Indonesia's governance levels were very poor in general, but for investors:

> [a]n even graver situation [has] been shown to exist with respect to the regulation of vital sectors of industry, of foreign investment, and of public sector activity. There is a frustrating confusion of hierarchies of laws and decrees, leading to a situation today [where] PLN is reduced to arguing that important contracts signed with foreign investors, actively promoted by the Government and indeed approved by a Minister, are illegal[88]

In the second case, Himpurna sued the Indonesian government for the damages awarded in the first arbitration after PLN refused to pay. Himpurna was again successful, with the arbitrators finding that the Indonesian government had actively obstructed both the project and the payment of damages. Paying $392 million placed significant stress on state budgetary arrangements and eventually prompted the Yudhoyono government to develop IIGF, as a better way of managing PPP projects.

As mentioned, the IIGF is a state-owned enterprise and thus

> has independent governance and its own balance sheet, and is isolated from the annual budget mechanisms. Its functions include 'ring fencing' or isolating the funds for government support for PPP projects, and putting a ceiling on government liabilities to the value of the IIGF … The isolation of funds within a separate entity makes it easier for investors and financiers to monitor the IIGF's financial state. As a company, the IIGF is subject to company law, under which it must produce periodical financial reports. The market mechanism thus disciplines its performance. In the event that its capital falls below a certain threshold, the IIGF will request additional capital from the government … It divests the market of the burden of dealing with bureaucracy and Indonesia's domestic politics, in contrast with the past system whereby a request for a guarantee was proposed through state bureaucracy, and without any clear procedure.[89]

Unfortunately, at the time of writing, the IIGF had not attracted any new PPP projects.

[85] See Presidential Decision 39 of 1997 on Cancellation/Review of Government, State-Owned Enterprise and Private Projects. This was amended by Presidential Regulation 47 of 1997, subsequently rescinded by Presidential Regulation 5 of 1998.

[86] Rulliadi (n 83) 216.

[87] *Himpurna California Energy Ltd (Bermuda) v PT. (Persero) Perusahaan Listruik [sic] Negara (Indonesia) (Final Award)* 4 May 1999, 70.

[88] *Himpurna California Energy Ltd (Bermuda) v PT. (Persero) Perusahaan Listruik [sic] Negara (Indonesia) (Final Award)* 4 May 1999, 72.

[89] Rulliadi (n 83) 218–19.

19

Financial Laws

Tax, Insolvency, and Banking

INTRODUCTION

In this chapter, we deal with the following areas of law relevant to the financial aspects of doing business in Indonesia: taxation, insolvency, and banking. The related topics of company law, labour law, foreign investment, and competition law are covered in Chapters 16, 17, 18, and 20.

TAXATION LAW

Article 23A of the 1945 Constitution provides for the passing of laws on taxation to meet the needs of the state. The most important tax legislation includes:

- Law 6 of 1983 on General Provisions and Taxation Administration (as amended by Law 9 of 1994, Law 16 of 2000, Law 28 of 2007, and Law 16 of 2009);
- Law 7 of 1983 on Income Tax (as amended by Law 10 of 1994, Law 17 of 2000, and Law 36 of 2008);
- Law 8 of 1983 on Value Added Tax on Goods and Services and Sales Tax on Luxury Goods (as amended by Law 11 of 1994, Law 18 of 2000, and Law 42 of 2009);
- Law 10 of 1995 on Customs (as amended by Law 17 of 2006);
- Law 11 of 1995 on Excise Tax (as amended by Law 29 of 2007);
- Law 28 of 2009 on Regional Taxes and User Charges; and
- Law 11 of 2016 on Tax Amnesty.

Indonesia's taxation system is highly complex.[1] All three levels of government in Indonesia—national, provincial, city and county—administer aspects of it. While the central government controls key areas such as income tax and value added tax, subnational governments have power to levy taxes and user charges. Some uncertainty surrounds the limits of regional government taxation.

Despite marked improvement over recent years, compliance rates are low, particularly for income and corporate tax. In fact, Indonesia has one of the lowest tax-to-GDP ratios in Asia. In 2014, only about 27 million of its 250 million people were registered taxpayers[2] and only 10.7 per cent were tax compliant in 2015, the most recent year for which data are available.[3] In 2017, Indonesia ranked 104 of 190 countries in PwC's global tax payment study, which ranks countries on their ease of filing tax payments. This was an improvement on its ranking of 131 of 185 countries in the same study five years earlier.[4]

[1] According to the World Bank, businesses in Indonesia make, on average, more than forty-three tax payments a year; and spend 221 hours per year filing, preparing, and paying taxes. The total tax rate was 30.6 per cent of profits: World Bank, *Doing Business 2017: Equal Opportunity for All* (World Bank Group 2017) 14 <http://www.doingbusiness.org/~/media/wbg/doingbusiness/documents/profiles/country/idn.pdf>.

[2] OECD, *OECD Economic Surveys: Indonesia 2016* (OECD Publishing 2016) 25 https://www.oecd.org/eco/surveys/indonesia-2016-OECD-economic-survey-overview-english.pdf.

[3] ibid 24.

[4] PwC, *Paying Taxes 2017* (11th edn, 2017) 126 <https://www.pwc.com/gx/en/paying-taxes/pdf/pwc-paying-taxes-2017.pdf>.

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The Indonesian government has attempted to reform the tax system over recent years, through efforts to improve tax literacy among the public, and to make paying taxes easier.[5] In July 2016, the government introduced a controversial tax amnesty programme to raise compliance rates, discussed below, and a compulsory e-payment system for tax liabilities, to make payments more convenient and transparent. Despite these initiatives, the government collected only Rp 1,284 trillion in tax revenue that year, well short of its target of Rp 1,547 trillion.[6] Indonesian taxpayers did, however, declare Rp 4,881 trillion in previously undeclared assets through the amnesty, which ran to March 2017.[7]

Corporate taxation

A company is a resident for tax purposes if established or domiciled in Indonesia (Article 2(3)(b) of the Income Tax Law). Resident companies are taxed on their worldwide income. In limited circumstances, some foreign companies may be able to operate a business in Indonesia through a 'permanent establishment', which will generally have the same tax obligations as a resident company, at least in respect of its Indonesia-derived income (Article 2(1)(a)).

Tax rates

The company tax rate is 25 per cent (Article 17(2a) of the Income Tax Law). Publicly listed companies are eligible for a corporate tax cut of 5 per cent if they have at least 40 per cent of their shares listed on the Indonesian Stock Exchange for at least 183 days in the relevant year.[8] Enterprises with an annual turnover of Rp 50 billion or under are eligible for an income tax reduction for the first Rp 4.8 billion of their gross turnover (Article 31E(1)).[9]

Tax filing

Corporate entities must pay tax monthly, which is calculated using their most recent annual income tax return (Article 25(1)). Corporate tax returns must be filed by the end of the fourth month after the book year ends (elucidation to Article 25(2)). Tax owing must be paid before the tax return is filed.

Deductions

Expenditure incurred to obtain, collect, and maintain taxable profits can be deducted from taxable income (Article 6(1) of the Income Tax Law), including the following.

1. Business expenses, such as:
    - materials;
    - wages, remuneration, honorariums, employee dividends and bonuses;

[5] ibid 68–69.
[6] World Bank, *Indonesia Economic Quarterly: Staying the Course* (World Bank 2017) 22.
[7] Sri Mulyani Indrawati, 'Finding a Realistic Tax to GDP Ratio for Indonesia's 2018 Budget' *Indonesia Investments* (31 May 2017) <https://www.indonesia-investments.com/news/todays-headlines/finding-a-realistic-tax-to-gdp-ratio-for-indonesia-s-2018-budget/item7863>.
[8] This is also regulated under Government Regulation 77 of 2013 on Income Tax Cuts for Publicly Listed Companies.
[9] Art 31E(1), Income Tax Law.

- interest, rent, and royalties;
- transportation costs;
- waste management costs;
- insurance premiums;
- promotion and sales costs;
- administration costs; and
- taxes other than income tax.

2. Uncollectable debts
3. Depreciation
4. Pension fund contributions
5. Capital losses
6. Foreign currency exchange losses
7. Research and development costs
8. Scholarship, apprenticeship, and training costs

Deductions are not permitted for:

- distributions of profit;
- personal expenses of shareholders, business allies, or members;
- profits set aside for reserves;
- personal insurance;
- entertainment services;
- excessive payments made to shareholders or other parties for work undertaken; and
- non-business gifts and aid, except for *zakat* (Islamic charitable contributions) (Article 9(1)).

Losses

Losses may be carried forward for a maximum of five years (Article 6(2) of the Income Tax Law). Businesses that invest in fields of high priority for national development can carry forward their losses for ten years (Article 31A(1)). Expenses on items that can be used for more than one year can be depreciated but not deducted (Articles 11 and 11a).

Depreciation of assets

The Law divides non-building assets into four categories, each of which provides for calculation of depreciation based on straight-line or declining balance.

- Category 1 assets, with a beneficial life of four years, depreciate at 25 per cent (straight-line) or 50 per cent (declining balance). Examples include computers, office equipment, motorcycles, and some equipment used in agriculture, forestry, farming, and fisheries.
- Category 2 assets, with a beneficial life of eight years, depreciate at 12.5 per cent (straight-line) or 25 per cent (declining balance). Examples include furniture, air conditioners, cars, buses, trucks, and some equipment used in agriculture, forestry, farming, and fisheries.
- Category 3 assets, with a beneficial life of sixteen years, depreciate at 6.25 per cent (straight-line) or 12.5 per cent (declining balance). Examples include machinery used in the textile, timber, chemical, and some mining sectors.

- Category 4 assets, with a beneficial life of twenty years, depreciate at 5 per cent (straight-line) or 10 per cent (declining balance). Examples include heavy construction machinery, trains, railway coaches, and heavy vessels.[10]

Building assets are divided into two categories: permanent (twenty years) and non-permanent (ten years). Permanent assets depreciate at 5 per cent, while non-permanent assets depreciate at 10 per cent (Article 11(6)).

Ministry of Finance regulations describe in more detail the assets included in each category.

Capital gains tax

Capital gains and losses are treated as income, except for share transactions, which are taxed as a percentage of the transaction value.[11]

Fringe benefits tax

No tax is payable on gifts or services in kind provided to employees.

Withholding taxes

Fifteen per cent of dividend payments to Indonesian residents are withheld as income tax, provided that the dividends are to be paid out of retained earnings and that the company holds at least 25 per cent of paid-in capital. Otherwise, dividends are taxed as company earnings at the same rate as the company's other income (Article 4(3)(f) of the Income Tax Law). More generally, companies, entities, and permanent establishments must pay a withholding tax of 15 per cent when providing resident taxpayers or permanent establishments with dividends, interest payments, royalties, prizes, and awards (Article 23(a)).

Withholding tax for non-resident recipients and foreigners is set at 20 per cent on:

- dividends;
- interest payments;
- royalties;
- fees for services, work, and activities;
- prizes and awards;
- pensions;
- hedging transactions; and
- gains from debt write-offs (Article 26).

This rate can be reduced if the non-resident or foreigner is from a country with a tax treaty with Indonesia. To claim reduced rates, a foreign-domiciled subject must provide a certificate of domicile to the taxation office through the Indonesian party paying their income.

Tax concessions and incentives

The Director General of Taxation can issue the following tax concessions:

- a reduction in net income of up to 30 per cent of the amount invested, at 5 per cent per year, for up to six years;
- acceleration of depreciation deductions;

[10] Examples taken from: PwC, *Indonesian Pocket Tax Book 2017* (PwC 2017) 4–5 <https://www.pwc.com/id/en/pocket-tax-book/english/ptb-2017.pdf>.

[11] Art 4(2), Income Tax Law; Art 1(2), Government Regulation 41 of 1994 on Income from Share Transactions (as amended by Government Regulation 14 of 1997).

- a carry-forward period for tax losses, up to ten years; and
- a maximum withholding tax on dividends of 10 per cent unless a lower rate is stipulated in tax treaties.[12]

Certain priority sectors enjoy tax holidays, for between five and fifteen years, including those classified as 'pioneer' industries.[13]

Personal taxation

Individuals resident in Indonesia are taxed on their worldwide gross income, less allowable deductions and non-taxable income. To be a resident for tax purposes, a person must be either domiciled in Indonesia, have lived in Indonesia for more than 183 days over a twelve-month period, or have been in Indonesia throughout the financial year and intend to live in Indonesia (Article 2(3)(a) of the Income Tax Law).

Tax must be paid in monthly instalments (Articles 25 and 20(4)). Personal tax rates vary from region to region; what follows is a general guide.

- Income up to 50 million rupiah: 5 per cent.
- Income between 50 and 250 million rupiah: 15 per cent.
- Income between 250 and 500 million rupiah: 25 per cent.
- Income over 500 million rupiah: 30 per cent (Article 17(1)).

Income and losses of married women are counted as part of their husband's income or losses, unless the woman's employer has withheld her tax and her employment is unrelated to her husband's or other family members' (Article 8(1)). Women can file their tax separately (Article 8(2)(c)).

Value added tax (VAT)

Importers, manufacturers, wholesalers, retailers, and most service industries must pay 10 per cent VAT (Article 7(1) of the VAT Law).[14] Rates can be varied between 5–15 per cent by government regulation (Article 7(3)). Vendors will usually include VAT in the prices they charge buyers. The vendor must pay any difference between the VAT collected and the accumulated output tax.

'Strategic' goods can be designated as exempt from VAT by government regulation; and goods deemed essential to national objectives are exempt from import VAT. One example of the latter is polio vaccines for the national immunization programme.[15] Other excluded categories of goods are:

- basic necessities, such as rice, corn, sago, soy, salt, eggs, milk, fruit, and vegetables;
- mined minerals, including crude oil, unprocessed natural gas, geothermal energy, asbestos, chalk, and limestone;
- food and drink served in hotels, restaurants, stalls, or prepared by caterers; and
- money, gold bars, and securities (Article 4A(2) and its elucidation).

[12] Art 31A(1), Income Tax Law. These are issued by the Director General on behalf of the Minister of Finance, based on the recommendation of the Investment Coordination Board (*Badan Kordinasi Penanaman Modal*, BKPM).

[13] For details, see Ministry of Finance Regulation 159/PMK.010/2015.

[14] Law 42 of 2009 amending the VAT Law.

[15] See Art 1(2), Government Regulation 38 of 2003 on Amendment of Government Regulation 146 of 2000 on Import and Delivery of Taxable Goods or Services that are Exempt from VAT.

Services excluded from VAT include:

- medical (hospital, paramedic, laboratory, and midwifery);
- veterinary;
- allied health (acupuncture, nutrition, physiotherapy, mental health, alternative therapies);
- social welfare (orphanages, firefighting, emergency response, rehabilitation, funeral services, and non-commercial sports services);
- postal;
- financial;
- insurance;
- religious;
- educational;
- arts and entertainment;
- non-commercial broadcasting;
- public transportation (land, sea, and domestic air);
- recruitment services;
- hotel and boarding house;
- public administration;
- parking;
- coin operated public telephone;
- money orders; and
- food and catering (Article 4A(3)).

Luxury goods tax

Sales tax for luxury goods ranges from 10 to 200 per cent, depending on the type of goods (Article 8(1) of the VAT Law).[16] It can only be charged once—either upon import or delivery—and importers or manufacturers are responsible for payment. These taxes have long been problematical in Indonesia, primarily because they are seen to encourage smuggling, and there is much debate about which products should attract it.

Land and building tax (Pajak Bumi dan Bangungan)

Indonesia's land and building tax (*Pajak Bumi dan Bangunan*, PBB) is payable on all land and buildings unless exempted under the Land and Building Tax Law.[17]

PBB is now a regional tax, regulated under Law 28 of 2009 on Regional Taxes and User Charges. Responsibility for collection of land taxes was handed over to regional governments in 2014 (Article 182(1) of the Regional Tax Law).[18] The tax due is calculated based on the sale value of the tax object (Article 79), multiplied by a maximum rate of 0.3 per cent

[16] The tax rates applied to vehicles are described in Government Regulation 22 of 2014 and specific products are set out in Minister of Finance regulations, such as Minister of Finance Regulation 35/PMK.010/2017.

[17] PBB is regulated by Law 12 of 1985 on Land and Building Tax Law, as amended by Law 12 of 1994.

[18] Amin Laili, *PBB Sektor Keenam Sebagai Pajak Pusat* Direktorat Jenderal Pajak (29 August 2014) <http://www.pajak.go.id/content/article/pbb-sektor-keenam-sebagai-pajak-pusat>.

(Article 80(1)). Local governments are expected to issue local regulations to set the PBB tariff (Article 80(2)). The minimum non-taxable NJOP is Rp 10 million (Article 77(4)). PBB does not apply to land:

- that serves the public interest (including religion, welfare, health, education, and national culture) and is not profit-oriented;
- used for graveyards and ancient remains;
- comprising protected forests, nature reserves, tourism forests, national parks, grazing land controlled by villages, and state land with no associated land rights;
- used by diplomatic representatives; and
- used by an international organization (Article 3 of Land and Building Tax Law).

Land and building transfer tax

Vendors must pay 2.5 per cent of the gross transfer value of transactions for the sale of basic houses and apartments, unless the transfer is made by a taxpayer involved in the property business, in which case the rate is 1 per cent.[19] The tax must be paid before the property rights are transferred.

Land and building acquisition tax

Purchasers must pay land acquisitions tax (*Bea Pengalihan Hak atas Tanah dan Bangunan*, BPHTN) before the deed transferring the land and property rights is signed.[20] The tax due is 5 per cent of the 'tax object acquisition value', which is the sale or market value of the land or building rights (Article 5 of Law 21 of 1997 and Article 6 of the Law 20 of 2000). The law also describes a maximum non-taxable threshold of Rp 60 million.[21] BPHTN is also included in regional taxes, and regulated under Articles 85–92 of Law 28 of 2009 on the Regional Taxes and User Charges Law. Regional taxes are discussed further below.

Document duty

Certain types of documents must be signed over a duty sticker, called a *meterai*, which indicates the cost of the sticker, which is usually Rp 6,000.[22] Duty stickers are commonly used on contracts, notarial deeds, land certificates, and other formal documents.[23] While they are required for many documents, which cannot be enforced by a court without them, they do not affect the formal validity of those documents.

Import tax

Goods that enter customs areas are subject to an import duty (Article 2(1) of the Customs Law),[24] the rate of which depends on the goods being imported, as determined by ministerial decisions. Exemptions and preferential duties apply for imported goods of ASEAN

[19] Art 2(1), Government Regulation 34 of 2016 on Tax on Income from Transfer of Land or Property, and Sales Contracts on Land and Property.

[20] Law 21 of 1997 concerning the Acquisition of Rights on Land and Buildings, as amended by Law 20 of 2000.

[21] The maximum non-taxable threshold is Rp 300 million for inheritances (Art 7(1), Law 20 of 2000).

[22] See Government Regulation 24 of 2000 on Changes to the Document Duty Tariff and Nominal Value Limits for Items that Incur Stamp Duty.

[23] See Art 2(1), Law 13 of 1985 on Document Duty.

[24] Import and export duties are governed by Law 10 of 1995 on Customs as amended by Law 17 of 2006 (the Customs Law).

origin and other countries that have bilateral trade agreements with Indonesia. Particular imports are restricted, including alcoholic drinks, ammunition, and hazardous waste.

Export duties can be applied to protect various national interests (Article 2A of the Customs Law). They apply to some domestic goods, including crude palm oil, cacao, wood, leather, and metal ores.[25]

Inheritance tax

No inheritance tax is imposed in Indonesia.[26]

Regional taxation

As discussed in Chapter 3, one of the most legally significant reforms of the post-Soeharto era has been decentralization, under which subnational governments were given broad policymaking and legislative powers. Many regional governments were quick to use their new powers to pass new laws to raise revenue,[27] mostly by imposing taxes or user charges (fees for government services, called *retribusi* in Indonesian).[28] Estimates vary, but local governments were said to have created around 1,000 new taxes and user charges in the first year of decentralization alone.[29] The Jakarta-based non-governmental organization, Regional Autonomy Watch (KPPOD), recorded 14,128 regional regulations or Perda (*peraturan daerah*) relating to taxes and licensing passed between 2001 and 2014.[30]

The 2009 Regional Tax Law outlines the various types of objects that subnational governments can tax. These include motor vehicle registration, petrol, hotels, electricity, parking, and even swallows' nests (Article 2(1)–(2)).[31] The Law also imposes caps on some types of taxes (Article 55).

Taxes can only be imposed through regional regulations, which must be submitted to a higher level of government for pre-approval.[32] Provincial governments must send their draft tax regulations to the Home Affairs and Finance Ministries (Article 157(1)); and city and county governments must send theirs to the provincial government (Article 157(2)). Approval can be denied if the draft seeks to impose an illegal tax, or is not in the public interest (Article 157(3)).

Tax compliance

Indonesia uses a self-assessment system by which taxpayers must assess, report, and pay their tax. Individuals are responsible for registering with the tax office and applying

[25] Finance Minister Regulation 13/PMK.010/2017 on Export Goods Subject to Export Duties.

[26] Art 4(3)(b), Law 7 of 1983 on Income Tax.

[27] Simon Butt and Nicholas Parsons, 'Reining in Regional Governments? Local Taxes and Investment in Decentralised Indonesia' (2012) 34 *Sydney Law Review* 91.

[28] Blane D Lewis, 'Tax and Charge Creation by Regional Governments under Fiscal Decentralization: Estimates and Explanations' (2003) 39 *Bulletin of Indonesian Economic Studies* 177.

[29] Blane D Lewis and Bambang Suharnoko Sjahir, 'Local Tax Effects on the Business Climate' in Neil McCulloch (ed), *Rural Investment Climate in Indonesia* (SEAS 2009) 224, 231.

[30] Passed under the 2009 Regional Taxes Law and its predecessor (Law 34 of 2000): Boedi Rheza and others, *Evaluasi Perda Pungutan Di Era UU No.28 Tahun 2009* (KPPOD 2014).

[31] Nests of the swallow, defined as birds of the collocalia genus (Art 1(36)), are highly valuable in Indonesia and are often used in soup.

[32] As discussed in Chapter 3, the Constitutional Court has recently removed the power of the central and regional governments to review and invalidate many types of Perda under the 2014 Regional Government Law. However, the Court's decisions do not touch upon the Regional Taxes Law, so the review procedures referred to in this paragraph remain in force. See Constitutional Court Decisions 137/PUU-XIII/2015 and 56/PUU-XIV/2016.

for a tax file number (*Nomor Pendaftaran Wajib Pajak*, NPWP) (Article 2(1) of the Tax Administration Law).[33]

Tax disputes

Taxpayers who disagree with a tax assessment letter can object to the Director General of Taxation within three months of receiving the letter (Article 25 of the Tax Administration Law). At this stage, any underpaid taxes attract a 50 per cent surcharge. The Director General must respond within twelve months (Article 26(1)). Taxpayers then have three months to appeal to the Tax Court (Article 27(3)). If the Tax Court decides in favour of the Director General, a surcharge of 100 per cent on unpaid taxes applies (Article 27(5d)).

There is only one tax court and it is in Jakarta.[34] It decides taxation disputes between taxpayers and government tax authorities. The Supreme Court does not administer it, as it does all other Indonesian courts, except the Constitutional Court. Instead, the Tax Court falls under the Finance Ministry's authority.[35] Tax Court decisions are generally final and have binding legal force. However, in limited circumstances (including where perjury is alleged), Tax Court decisions can be reopened by the Supreme Court using the PK (*Peninjauan Kembali* 'reconsideration') process,[36] discussed in Chapter 4.

Tax enforcement powers

Tax officials have a range of powers to enforce tax obligations. Under the Tax Collection Law,[37] they can confiscate assets up to the value of tax owed plus administrative fees (Article 14(2)). They can also prevent a taxpayer from leaving the country, and can detain the taxpayer if the amount owing exceeds Rp100 million and the taxpayer appears to be avoiding his or her tax obligations (Articles 29 and 33).[38]

Tax offences

Negligence

Failure to submit a tax return, or issuing a false or incomplete tax return due to negligence that results in loss to the state, is punishable by three months to one year's *kurungan* imprisonment[39] and a fine amounting to one to two times the amount of tax owed (Article 38 of the Taxation Administration Law). These punishments do not apply the first time a mistake is made, provided that the taxpayer pays the outstanding amount plus an administrative fine equivalent to 200 per cent of the unpaid amount (Article 13A of the Taxation Administration Law).

[33] Law 6 of 1983 on General Provisions and Taxation Administration (as amended by Law 9 of 1994, Law 16 of 2000, Law 28 of 2007, and Law 16 of 2009).

[34] Established by Law 14 of 2002 on the Taxation Court.

[35] The Supreme Court does, however, supervise 'technical-legal' aspects of the Tax Court's work. Although many of its judges are career judges, appointed by the president from a list of names proposed by the minister after obtaining the agreement of the Supreme Court chief justice, ad hoc judges may also be appointed to the Court.

[36] See Art 93, Law 14 of 2002 on the Tax Court. The procedure is also described under Supreme Court Regulation 3 of 2002 on Procedures for Judicial Review of Tax Court Decisions.

[37] Law 19 of 1997 on Tax Collection by Warrant.

[38] Detention must be authorized in writing by the Minister of Finance and the regional governor (Art 33(2)).

[39] *Kurungan* and other forms of imprisonment are discussed in Chapter 10.

Evasion with intent

Up to six years' imprisonment and a fine amounting to four times the tax owed can be imposed on anyone who: fails to obtain a tax file number or submit a tax return; submits a false tax return; displays false books, records, or other documents; refuses to display or submit books, records, or other documents; does not keep books or records in Indonesia; does not keep books, records, or documents, including electronically managed data or documents; or fails to pay tax owing, thereby causing loss to the state (Article 39(1) of the Taxation Administration Law).

Punishments can be doubled if the offender commits more than one tax crime in a single year (Article 39(2) of the Taxation Administration Law). Criminal sanctions may also be imposed on representatives of the taxpayer (Article 43(1)).

BANKRUPTCY, INSOLVENCY, AND LIQUIDATION LAW

Indonesian bankruptcy law was overhauled after the Asian Financial Crisis of 1997 and 1998 devastated the Indonesian economy, crippling its banking and corporate sectors.[40] Under pressure, Soeharto began the reforms by issuing Interim Emergency Law (*Peraturan Pengganti Undang-Undang* or *Perppu*) 1 of 1998, which was soon endorsed as legislation by the national legislature.[41] The 1998 Bankruptcy Law replaced the archaic colonial bankruptcy law,[42] which had long since fallen into desuetude. A new court, the Commercial Court (*Pengadilan Niaga*), was established at the Central Jakarta District Court to handle an expected flood of debt claims created by the crisis (Articles 280(1) and 281 of the 1998 Bankruptcy Law). In 1999, commercial courts were established in the Ujung Pandang (Makassar), Medan, Surabaya, and Semarang district courts.[43] These sweeping reforms were driven almost entirely by the International Monetary Fund (IMF) as a condition of its bailout of Indonesia's banking system. The IMF put the Indonesian government under extraordinary pressure to deliver these reforms quickly. They were completed with great haste, in less than a year, and the new court began hearing cases even though its judges were clearly not ready to do so.

In the Court's early years, many creditors were foreign and debtors Indonesian; controversially, creditors were rarely successful. The Court's decisions were therefore widely seen as acting out a wider political debate in Indonesia about the need for economic nationalism and protectionism to resist perceived 'asset stripping' by international capital, exploiting the collapse of the Indonesian rupiah during the Asian Economic Crisis. While these criticisms undoubtedly contained much truth, in many cases the problems were as much about the Court's lack of technical competence as political bias. Bankruptcy cases had rarely if ever come before Indonesian courts prior to 1997, and the new judges had no experience and limited knowledge of the complex financial transactions disputed in the cases that came before them, such as derivatives and syndicated loans. As the Court had been established in such a rush, there had been little opportunity to train the new judges, so their decisions often betrayed confusion and incomprehension—which further added to the dissatisfaction felt by creditors. The system has since been improved but still fails to

[40] For analysis of these reforms and the early years of the Commercial Court from a range of different perspectives, see Tim Lindsey, *Indonesia: Bankruptcy, Law Reform & the Commercial Court: Comparative Perspectives on Insolvency Law and Policy* (Desert Pea Press 2000); Tim Lindsey 'The IMF—and Insolvency Law Reform in Indonesia' (1998) 34 *Bulletin of Indonesian Economic Studies* 119.

[41] Law 4 of 1998 on the Adoption of Emergency Law 1 of 1998 on Amendments to the Law on Bankruptcy.

[42] Faillissements-Verordening, Staatsblad 1905 Nomor 217 juncto Staatsblad 1906 Nomor 3481.

[43] Presidential Decision 97 of 1999.

meet expectations. The commercial courts are, in fact, still struggling to build credibility and attract cases. In 2016, for example, they decided just 291 cases across the whole of Indonesia.[44]

Bankruptcy is now principally regulated by Law 37 of 2004 on Bankruptcy and Suspension of Debt Payments and Law 40 of 2007 on Companies. Under these statutes, bankruptcy constitutes the seizure of a bankrupt debtor's assets for management by a curator (*kurator*), a receiver acting under the supervision of a judge (Article 1(1) of the Bankruptcy Law). We note that bankruptcy does not necessarily mean insolvency. The debtor is placed into receivership until its debts are dealt with; insolvency might follow but that will not always be the case. A bankrupt person may, for example, obtain 'rehabilitation' from the court—that is, be released from receivership, subject to creditor approval (Articles 215 and 216 of the Bankruptcy Law).

Applications for bankruptcy

The requirements for a court declaration of bankruptcy are relatively easy to satisfy. A debtor who has 'two or more creditors and does not repay at least one debt that has become payable' may be declared bankrupt by a court at the request of the debtor itself or one or more of its creditors (Article 2(1)). Debts are sums of money in any currency, and can be direct or contingent, or arise by contract or the operation of law (Article 1(6)).

The relative ease with which these requirements can be met reflects the intention of drafters that the Law provide a way to force debtors to 'pay up'. However, this causes problems where the existence of a debt is in dispute, as is often the case. A notorious example of this involved PT Asuransi Jiwa Manulife, the Indonesian life insurance subsidiary of a Canadian multinational, Manulife Financial Corporation. In 2000, it became involved in a dispute with its previous Indonesian partner, the Dharmala group, and found itself declared bankrupt for unpaid 'debts' that were, in fact, just contested denials of life insurance claims. This happened even though Asuransi Jiwa Manulife was clearly solvent and financially strong. Manulife was later discharged from bankruptcy and it became clear that the bankruptcy proceedings were simply a tactic in a much larger commercial struggle.[45]

Directors who want the company they direct to file for bankruptcy must first obtain shareholder approval (Article 104(1) of the Companies Law). Public prosecutors can also seek bankruptcy declarations in the public interest. Only the central bank can request a bankruptcy declaration where a debtor is a bank (Article 2(3) of the Bankruptcy Law).[46]

Bankruptcy proceedings

The Commercial Court with jurisdiction over the company's place of domicile handles bankruptcy applications about the company (Article 3(1)). Once a request for a bankruptcy declaration is filed, claims must be heard within twenty days and decisions made within sixty days (Articles 6(6), 8(5)).

[44] Mahkamah Agung, *Laporan Tahunan 2016* (Mahkamah Agung 2017) 91.

[45] For a detailed analysis of the dispute, see David Linnan, 'Commercial Law Enforcement in Indonesia: The Manulife Case' in Tim Lindsey (ed), *Indonesia: Law and Society* (2nd edn, Federation Press 2008).

[46] Alfin Sulaiman, 'Hubungan OJK Terhadap Prosedur Kepailitan Perbankan dan Industri Keuangan' *Hukumonline Klinik* (6 May 2014) <http://www.hukumonline.com/klinik/detail/lt52dfe654d9902/hubungan-ojk-terhadap-prosedur-kepailitan-perbankan-dan-industri-keuangan>.

Upon a declaration of bankruptcy, the court will appoint a receiver (Articles 1(5) and 15(1)) and a supervisory judge. The receiver must be independent, not have a conflict of interest with either the debtor or the creditor, and not handle more than three bankruptcy cases or payment obligation suspensions at once (Article 15(3)). The debtor and creditor can nominate a creditor but if the court deems the choice inappropriate, it will nominate the state Estate Property Bureau (*Balai Harta Peninggalan*) (Article 15(2)).

Within five days of receiving a bankruptcy declaration, the receiver must publish a notice announcing liquidation in the State Gazette and at least two newspapers, as directed by the supervising judge (Article 15(4)).

Debtors or creditors can appeal bankruptcy decisions on cassation to the Supreme Court (Article 11(1)). Cassation applications must be filed within eight days of the bankruptcy decision (Article 11(2)). The Supreme Court must then issue its decision within sixty days of receiving the application (Article 13(3)). A PK application to the Supreme Court (discussed in Chapter 4) can also be brought in respect of either the original bankruptcy decision (if there is no cassation) or the cassation decision (Article 14(1)). Again, the PK decision must be handed down within sixty days of receipt of the application (Articles 14(2) and 13(3)).

Consequences of bankruptcy

From the date of bankruptcy, the receiver manages the estate and settles debts (Article 16) and the debtor loses the right to control and manage assets comprising the bankrupt estate (Article 24). The debtor can retain control over basic necessities, such as tools, medical supplies, furniture used by the debtor and debtor's family, and food supplies for thirty days (Article 22). Earnings—including income, salary, pension, allowance, or alimony payments—can also be exempted by order of the court. Where the debtor has a spouse and they own joint matrimonial property, the spouse will also be considered a bankrupt debtor (Article 23).

Any legal actions relating to company assets filed prior to the bankruptcy declaration end with the bankruptcy declaration (Article 31). Claims on the bankrupt's estate based on contract can only be pursued by lodgment for assessment by the receiver (Articles 26 and 27). Company employees can be terminated after forty-five days' notice. Employee wages become part of the debt owed by the bankrupt estate (Article 39).

Invalid transactions

The Commercial Court can cancel any legal transactions that result in creditor losses, if the bankrupt and the party with whom the bankrupt transacted knew, or should have known, that the transaction would result in those losses (Article 41(1) and (2)). Article 42 sets out various related-party situations where cancellation is appropriate. These include payments made for, or in the interests of, husband or wife, adopted children, or any family member up to three degrees of separation. They also include transfers to a legal entity in which relatives occupy a management position or own more than 50 per cent of issued shares in the entity. The debtor is presumed to have been aware of the damage to creditors caused by such transactions if the transaction took place within a year before the declaration of bankruptcy (Article 44).

Liquidation

A company's dissolution is accompanied by its liquidation by a liquidator or curator (Article 142(2)(a) of Law 40 of 2007 on Companies). During liquidation, the company must

not enter into any transactions unless necessary for the liquidation process (Article 142(2)(b)). If this requirement is violated, directors, commissioners, and the company are jointly and severally liable.

The duties and liabilities of liquidators resemble those of directors (Article 142(6) of the Companies Law). They must also:

- record and collect company assets and liabilities;
- announce the liquidation and plan to divide company assets in a newspaper and the State Gazette;
- pay all creditors;
- pay any remaining assets to shareholders; and
- perform other actions necessary to deal with company assets (Article 149(1) of the Companies Law).

Dissolution

Unless otherwise specified in their articles of association, companies can be dissolved by a general shareholders' meeting attended by those comprising three-quarters of shares with voting rights, if the decision is approved by three-quarters of those in attendance (Article 89(1)).

The state can dissolve a company upon a request by:

- the public prosecutor, because the company has violated the public interests or engaged in illegal activities (Article 146(1)(a) of the Companies Law);
- interested parties, if the company's formal establishment was defective (Article 146(1)(b)); and
- shareholders, directors, or commissioners, if the company's continuation is impossible (Article 146(1)(c)).

A company does not lose its legal personality until the liquidation process is finished and a general meeting of shareholders or the court accepts the liquidator's decision about the liquidation (Article 143(1)).

Within thirty days of dissolution, liquidators must publish a notice to creditors in a national Indonesian newspaper and the State Gazette. The liquidator must also inform the relevant minister so that a dissolution notice can be included in the company register (Article 147(1)). The notice to creditors must include procedures and timeframes for lodging claims (Article 147(2)), which is sixty days after the official announcements (Article 147(3)). Liquidators who fail to meet notice requirements are jointly and severally liable for third party losses (Article 148(3)).

Dissolution of companies is also covered in Chapter 16.

BANKING

The Asian Financial Crisis severely shook Indonesia's banking sector, leaving almost all banks insolvent. Bailing them out cost 70 per cent of Indonesia's GDP in 1999 alone.[47] The crisis revealed the inadequacy of governance and supervisory frameworks and a fundamental lack of prudential control.

[47] Jay K Rosengard and A Prasetyantoko, 'If the Banks Are Doing So Well, Why Can't I Get a Loan? Regulatory Constraints to Financial Inclusion in Indonesia' (2011) 6(2) *Asian Economic Policy Review* 273.

This led to major restructuring and reforms that brought regulatory and supervisory practices closer to international standards. Since 1999, Indonesia has vastly improved its prudential regulation and supervision over the banking sector. For many observers, that sector's relative resilience during the recent Global Financial Crisis is evidence of the effectiveness of these reforms.[48] Today, total financial system assets are worth 72 per cent of GDP, and banks hold 77 per cent of assets.[49]

Bank Indonesia

Indonesia's central bank is Bank Indonesia.[50] As an independent state institution, it is formally free from government or other interference (Article 4(2) of Law 23 of 1999 on Bank Indonesia, as amended) and is charged with maintaining stability of the currency (Article 7). Its core functions are to: prescribe and implement monetary policy (including setting interest rates); regulate and safeguard the finance system; and regulate and supervise banks (Article 8).

Bank Indonesia's key objectives originally included: harmonizing the organization of bank supervision procedures; and improving bank supervision management primarily through risk control, including by introducing risk-based supervision and rectifying prudential regulations (Article 25). It was responsible for: bank licensing; approving bank ownership and management structures; controlling and supervising bank performance and financial status; issuing rules and regulations; monitoring compliance; and imposing sanctions for violations (Article 24). Most of these functions have now been transferred to the new Financial Services Authority.

Financial Services Authority (*Otoritas Jasa Keuangan*)

The Bank Indonesia Law required the establishment of a new independent agency to supervise the banking, insurance, and securities sector (Article 34).[51] This is the Financial Services Authority (*Otoritas Jasa Keuangan*, OJK), established by Law 21 of 2011 on the Financial Services Authority (the OJK Law). The OJK has since taken over most of Bank Indonesia's finance sector supervisory responsibilities. It is now the principal regulatory agency for financial service institutions, including securities companies, insurance companies, pension funds, finance companies, and banks (Article 6 of the OJK Law). The transfer of authority over financial services other than banks took place in 2013 and over banks in 2014 (Article 55).

The OJK's main tasks are to:

- ensure that financial service transactions are regulated, just, transparent, and accountable;
- oversee the stability and sustainable growth of the financial system; and
- protect the interests of consumers and society (Article 4 of the OJK Law).

[48] PS Srinivas, 'Indonesia's Financial Sector: A Half-Full Glass' *Strategic Review* (March 2013) <http://www.sr-indonesia.com/in-the-journal/view/indonesia-s-financial-sector-a-half-full-glass>.

[49] IMF, 'Indonesia: Financial System Stability' (2017) *IMF Country Report 17/152* <https://www.imf.org/~/media/Files/Publications/CR/2017/cr17152.ashx>.

[50] Bank Indonesia was established by Government Regulation 2 of 1946. It is now primarily regulated by Law 23 of 1999 on Bank Indonesia, amended by Law 3 of 2004, and Law 6 of 2009 on the Adoption of Interim Emergency Law 2 of 2008 on Amendment of Law 23 of 1999.

[51] The 1999 Bank Indonesia Law originally required that the institution be established before the end of 2002 but Law 3 of 2004 extended this deadline to end of 2010.

Like Bank Indonesia, the OJK is independent (Article 2(2)). The OJK must, however, coordinate with Bank Indonesia when determining banking policies.

The OJK's Board of Commissioners is its highest decision-making organ, and must be collective and collegial (Article 10(1)–(2)). Its chief executive serves on, and reports to, the Board (Article 10(4)).

The Indonesian Bank Restructuring Agency

If Bank Indonesia believes a banking problem is causing detriment to the national economy, it can ask the government to establish a temporary agency to oversee bank restructuring.[52] With Indonesia facing economic crisis, the Bank did just this in early 1998, and the government established the Indonesian Bank Restructuring Agency (IBRA),[53] giving it power to oversee the major IMF-led bank restructuring process then underway. The Agency's primary tasks were to: verify customer claims under a blanket guarantee scheme; dispose of assets of banks that had been taken over; restructure and sell loans transferred from banks; and divest government ownership in recapitalized banks. IBRA had broad powers to control banks, including to take over and exercise all rights and powers of shareholders, directors and commissioners; to manage ownership transactions over bank assets; and to review, cancel, terminate, or amend bank contracts.

IBRA proved highly controversial, and was regularly accused of corruption.[54] Under Article 2(4), it was designed to be temporary, and was disbanded in 2004.[55] In April 2017, former IBRA chairman Syafruddin Arsyad Temenggung was named a corruption suspect by the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi*, KPK).[56]

Indonesian Deposit Insurance Corporation

During the economic crisis, the government passed various regulations designed to improve public confidence in the banking sector, providing blanket guarantees on deposits.[57] However, concern arose that these guarantees could excessively encumber state finances and promote 'moral hazard' in the system.[58] The revised 1998 Law on Banking (Law 10 of that year) mandated the establishment of the Indonesian Deposit Insurance Corporation (*Lembaga Penjamin Simpanan*, LPS).[59] LPS was established by Law 24 of 2004 and came into operation in September 2005. It has two functions: first, to guarantee customer deposits and maintain banking system stability, including by formulating and issuing policies; and, second, managing failed banks that could have systemic impact.[60] A 100 million rupiah limit on deposit guarantees now applies (Article 11(1) of the Banking Law).[61] All banks must participate in the scheme (Article 8(1)) and pay a premium of 0.1

[52] Art 37A, Law 14 of 1967, as amended by Law 7 of 1992 and Law 10 of 1998 on Banking.

[53] Presidential Decision 27 of 1998 on the Establishment of the Indonesian Bank Restructuring Agency and Presidential Decision 34 of 1998 on the Tasks and Authorities of IBRA. The tasks and functions of the body were further elaborated under Government Regulation 17 of 1999 on IBRA.

[54] A notorious example implicating IBRA involved the channelling of funds from Bank Bali to Golkar: Andrew Walter, *Governing Finance: East Asia's Adoption of International Standards* (Cornell University Press 2008) 59.

[55] Presidential Decision 15 of 2004 on the Conclusion of Tasks and Disbandment of IBRA.

[56] Safrin La Batu, 'KPK Goes All in on BLBI Case' *Jakarta Post* (26 April 2017) <http://www.thejakartapost.com/news/2017/04/26/kpk-goes-all-in-on-blbi-case.html>.

[57] Examples include Presidential Decision 26 of 1998 on Guarantees of Payment Responsibilities of Public Banks and Presidential Decision 193 of 1998 on Guarantees of Payment Responsibilities of People's Credit Banks.

[58] See the General Elucidation to Law 24 of 2004.

[59] Art 37B(2)(3), Law 10 of 1998 on the Amendment of Law 7 of 1992 on Banking.

[60] Arts 4 and 5, Law 24 of 2004 on the Deposit Insurance Corporation, as amended by Law 7 of 2009.

[61] Limits on the maximum deposits guaranteed were introduced in phases, with the Rp 100 million limit introduced in March 2007, eighteen months after the law came into effect (Art 100).

per cent every year, calculated using the monthly average level of their customers' deposits (Article 13(1)).

Commercial banks

Three main types of bank operate in Indonesia: commercial banks; people's credit banks (also referred to as 'rural banks'); and Islamic banks (which can be classified as either commercial banks or people's credit banks). Falling within the commercial bank category are four state-owned banks (including one state Islamic banking unit) and 115 private banks (including thirteen Islamic banks and twenty-one Islamic banking units in conventional banks).[62] The market is dominated by the five largest commercial banks; and they include all four state-owned banks—Bank Negara Indonesia (BNI), Bank Rakyat Indonesia (BRI), Bank Tabungan Negara (BTN), and Bank Mandiri.[63]

According to the OJK and Bank Indonesia, Indonesia has too many banks. It has issued regulations to encourage consolidation of the sector, as discussed below.

Corporate structure and ownership of commercial banks

A commercial bank must be a limited liability company, a cooperative, or a regional government enterprise (Article 21 of the Banking Law). A commercial bank can be established by Indonesian citizens, an Indonesian legal entity, or as a joint venture with foreign citizens or a foreign legal entity (Article 22).

Ownership regulations

Commercial banks can issue shares on the stock exchange (Article 26). In the aftermath of the Asian Financial Crisis, the government relaxed limits on foreign ownership of banks to 99 per cent.[64]

In 2012, however, Bank Indonesia issued a regulation limiting banks and financial institutions to owning a maximum of 40 per cent of shares in a local bank.[65] Non-financial institutions are limited to owning up to 30 per cent of shares. Individuals are limited to owning 20 per cent of shares in conventional banks and 25 per cent of shares in Islamic banks.[66] These limits apply to both foreign and local entities or individuals. It is still possible to exceed these limits, with approval, provided that the bank or financial institution is financially healthy, meets certain capital requirements, is publicly listed, and receives banking regulator approval in its own country (Article 6). The bank in which shares are being acquired must list 20 per cent of its stock within five years (Article 7).

In 2006, Bank Indonesia issued rules allowing a shareholder of any type, foreign or local, to control only one bank.[67] A controlling shareholder is a legal entity or individual holding at least 25 per cent of shares with voting rights or exercising control over the bank (Article 1(3)). Exceptions apply for shareholders who own a commercial bank and an Islamic bank, or a commercial bank and a joint-venture bank, or a bank holding company (Article 2).

[62] For further information on Indonesia's banks and the banking system, see OJK, *Direktori Perbankan Indonesia 2016* (Otoritas Jasa Keuangan 2016).

[63] Bank Mandiri is Indonesia's largest commercial bank.

[64] Government Regulation 29 of 1999 on Acquiring Public Bank Shares.

[65] Bank Indonesia Regulation 14/8/PBI/2012.

[66] Art 2(2), (3), Bank Indonesia Regulation 14/8/PBI/2012.

[67] Bank Indonesia Regulation 8/16/PBI/2006; Bank Indonesia Regulation 14/24/PBI/2012.

These single presence rules have required some banks to: merge with others; consolidate; restructure to establish a parent company with subsidiaries; or create a holding company. The rationale behind the rules was improving the economic scale of individual banks and the effectiveness of supervision.

Foreign ownership in the banking sector remains controversial. In 2016, ten Indonesian banks were foreign-owned, and there were about sixteen joint ventures.[68]

Corporate governance

Changes in the membership of the boards of commissioners or directors of a bank must be reported to Bank Indonesia (Article 38(2) of the Banking Law). Special provisions apply to the employment of expatriates (see Article 39). Various statutory requirements and voluntary norms apply to corporate governance, including in banks, and these are discussed in Chapter 16.

OJK Regulation on corporate governance in commercial banks

In 2016, the OJK issued a regulation on corporate governance in the banking sector.[69] Members of boards of commissioners of banks must pass a fit and proper test (Article 6(3) of OJK Regulation 55/POJK.03/2016) and must include audit, risk monitoring, and remuneration and nomination committees (Article 34(1)). At least 50 per cent of the board of commissioners, and its president director, must be independent of controlling shareholders (Articles 5 and 24(1), (2)). A majority of directors must have at least five years' experience as a bank executive officer (Article 6(2)). Directors must also pass a fit and proper test (Article 6(3)). Commissioners and directors also have significant disclosure obligations, including to disclose all domestic and international shareholdings of greater than 5 per cent in banks or other firms (Articles 21 and 39).

The OJK rules require banks to prepare an annual good corporate governance report (Article 64(1)), which includes: an implementation self-assessment and discloses the shareholdings of boards of commissioners and directors, family relationships among board members or shareholders; the frequency of meetings of the board of commissioners; internal fraud cases and their handling; transactions giving rise to conflicts of interest; and funds provided for social and political causes (Article 64(2)). The report must be published on the bank's website and submitted to the OJK and to the bank's shareholders (Articles 65 and 66).

Conflict of interest and wilful violations of banking laws—criminal provisions

The Banking Law imposes three to eight years' imprisonment and a Rp 5 billion to Rp 100 billion fine upon commissioners, directors, and bank employees who accept money or other benefits for themselves or their families in return for favourable treatment. These include down-payment guarantees; credit facilities; purchases of bills of exchange, promissory notes, cheques, commercial papers, or other proofs of liability; or extensions of credit limits (Article 49(2)(a)). The same penalties apply to members and employees who fail to ensure adherence to the Banking Law and other prevailing laws (Article 49(2)(b)).

[68] 'Consolidation of State-Owned Banks in Indonesia: A Recipe for AEC Success?' *Global Business Guide Indonesia* (29 April 2016) <http://www.gbgindonesia.com/en/main/business_updates/2016/consolidation_of_state_owned_banks_in_indonesia_a_recipe_for_aec_success_11536.php>.

[69] OJK Regulation 55/POJK.03/2016 on Governance of Commercial Banks, replacing Bank Indonesia Regulation 8/4/PBI/2006 on the Implementation of Good Corporate Governance by Commercial Banks.

Principal activities

According to the Banking Law, the permitted activities of commercial banks include:

- mobilizing funds from the public as deposits, including demand, term, savings, and other deposits;
- extending credit;
- issuing notes;
- purchasing, selling, or guaranteeing bills of exchange; notes and other commercial papers; treasury bills and government guarantees; Bank Indonesia Certificates (SBIs); bonds; and other securities;
- transferring money;
- borrowing from or lending to other banks;
- holding securities and settling accounts with or among third parties;
- providing safety deposit boxes;
- undertaking placement of funds among customers in the form of securities not listed on the stock exchange;
- conducting business in factoring, credit cards, and trusteeships;
- providing finance and conducting other activities based on shari'a principles;
- conducting other business commonly undertaken by banks;
- conducting activities in foreign exchange;
- investing in other banks or business entities operating in financial services, such as leasing, venture capital, securities houses, insurance, and securities clearing houses;
- conducting temporary equity participation to settle bad debts or bad financing based on shari'a principles, provided that the equity participation is withdrawn in due time; and
- founding or managing a pension fund (Articles 6 and 7).

Explicit prohibitions

Commercial banks must not participate in equity markets, unless temporarily to settle bad debt and in entities operating financial services (Article 10). They also must not engage in insurance activities (Article 10).

Deposits

Banks must guarantee deposits of public funds (Article 37B) with the Indonesian Deposit Insurance Corporation (LPS).

Lending

When extending credit or finance, banks must ensure no detriment to the interests of the bank or its depositors (Article 29(4)). Banks must also inform their customers of possible risks involved in a transaction (Article 29(5)).

According to the Banking Law, no more than 30 per cent of a bank's capital can be extended as credit to a single borrower or group of related borrowers (Article 11(1)-(2)). No more than 10 per cent of bank capital can be used for loans, guarantees, and other business activities for: shareholders holding 10 per cent or more of paid-in capital of a bank;

members of the boards of commissioners or directors, or their relatives; bank officers; and business entities related to these parties (Article 11(3)).

However, Bank Indonesia Regulation 7/3/2005, as amended by Regulation 8/13/PBI/2006 on Legal Lending Limits for Commercial Banking, sets a lending limit of 20 per cent of a bank's capital for a single borrower and 25 per cent for a group of related borrowers (Article 11(1)(2)). Meanwhile, the lending limit for 'related parties' is set at 10 per cent (Article 4). The list of 'related parties' is long, and includes individuals, companies, or legal entities controlling the bank; commissioners, directors or executive officials; and parties with family relations with a bank controller, commissioner, director or executive official (Article 8(1)).

New regulations for business loans: MSMEs

Micro, small, and medium enterprises (MSMEs) are businesses with an annual net profit under 10 billion or an annual income under Rp 50 billion (Article 1(5) of Bank Indonesia Regulation 14/2012). MSMEs generally lack access to credit, because the dominant banks tend to avoid the relatively higher transaction costs and risks associated with them. The loan portfolios of most Indonesian banks are therefore heavily weighted towards big business and corporate clients.[70]

Under a Bank Indonesia Regulation released on 22 December 2012 (14/22/PBI/2012),[71] all commercial banks must channel at least 20 per cent of total loans to the SME sector by 2018 (Article 2(2)). This includes foreign and joint venture banks. The reform was to be introduced in stages such that by 2015, 5 per cent of loan portfolios were directed towards MSMEs; 10 per cent by 2016; 15 per cent by 2017; and 20 per cent by 2018 (Article 2(4)). In early 2017 however, the OJK reported that 20 per cent of banks had not met the 20 per cent target.

Confidentiality

Banks must keep information about depositors and their deposits confidential except if disclosure is needed for tax investigations, debt actions, criminal proceedings, or civil proceedings between a bank and its customer (discussed below).

General reporting requirements

Banks must cooperate with the OJK and provide all necessary documentation, information and clarifications if audited (Article 30 of the Banking Law). Commissioners, directors, or bank employees who falsify, erase, change or obscure reports on business activities or transactions, face penalties of five to fifteen years in prison and a fine of Rp 10 billion to Rp 200 billion (Article 49(1)).

Each calendar year, banks must submit a profit and loss statement and balance sheet to the OJK for auditing by a public accountant (Article 34). Banks must also publish their profit and loss statements within a timeframe designated by the OJK (Article 35).[72]

Disclosure rules

Banks are required to maintain the confidentiality of information about the financial records of depositors (Article 40). However, these rules can be circumvented in some

[70] Rosengard and Prasetyantoko (n 47) 281.
[71] As amended by Regulation 17/12/PBI/2015.
[72] Reporting procedures are further discussed in OJK Regulation 6/POJK.03/2015 on Transparency and Publication of Bank Reports.

circumstances. Bank Indonesia can, for example, under direction from the Finance Minister, order any bank to disclose information about the financial condition of a depositor for the purposes of taxation (Article 41). Bank Indonesia can also authorize the Agency for the Management of State Loans and Auctions (*Badan Urusan Piutang dan Lelang Negara*, BUPLN) to access information about a depositor for the purposes of settling a bank's claims (Article 41A). The banking regulator can also authorize a police officer, a prosecutor, or a judge to access information about a depositor suspected of a crime or facing a criminal charge (Article 42). If involved in civil litigation with one of its customers, a bank can disclose information concerning that customer's financial position (Article 43).

Disclosure of financial information has been controversial in Indonesia. In early 2017, the government passed Interim Emergency Law (Perppu) 1 of 2017 on Access to Financial Information for Taxation Purposes. It was passed into law in late July, partly to ensure that Indonesia could meet its commitments under the OECD's Automatic Exchange of Information standards, which are designed to detect tax evasion.[73] The Law allows the Directorate General of Taxation to directly access consumer accounts without having to first secure permission from the Finance Minister or the OJK.

Information sharing between banks

Banks can share financial information about their customers with other banks (Article 44).

Supervision, investigations, and audits

Bank Indonesia can audit and investigate the activities of banks (Article 31) or can appoint a public accountant to do so on its behalf (Article 31A). Banks must provide inspectors or auditors with any information or data requested; an opportunity to inspect the bank's books; and anything else required (Article 30).

Bank Indonesia maintains a risk-based classification system for its bank monitoring: routine, intensive supervision or special surveillance.[74] Banks that fail to comply with certain prudential regulations, such as lending ratios or limits on non-performing loans, can come under special or intensive supervision or special surveillance, and additional reporting and disclosure requirements.

Bank failure

Bank Indonesia can oversee steps taken by banks in poor financial health or in danger of bankruptcy. These include:

- raising shareholder capital;
- allowing shareholders to replace the boards of commissioners and directors;
- writing off bad debts or financing based on shari'a principles;
- undertaking a merger or amalgamation with another bank;
- selling all of part of the bank or its assets or liabilities; and
- transferring management of operations to another party.[75]

[73] See Preamble (c) to Interim Emergency Law 1 of 2017.
[74] See OJK <http://www.ojk.go.id/id/kanal/perbankan/Pages/Bank-Dalam-Pengawasan-Khusus.aspx>.
[75] Art 37(1), Banking Law.

As mentioned above, one of the primary functions of the LPS is to take over management of banks, the failure of which could have systemic impact. Law 9 of 2016 on Prevention and Management of Financial System Crises also addresses the management of failing banks. The Law creates financial system stability committees, which must outline how these failing banks should be managed, before handing management over to the LPS. The committees are comprised of the Minister of Finance, the governor of Bank Indonesia, and the heads of the OJK and LPS (Article 4(3) of the Financial System Crises Law).

Bank Indonesia must first inform the LPS that it is attempting to improve the health of a failing bank (Article 21(1) of the 2004 LPS Law). For banks with a non-systemic impact, the LPS must consider the investment required to ensure solvency versus the cost of guaranteeing deposits, paying wages, severance packages, and income from asset sales (Articles 22 and 23). The cost of rescue must be lower than the cost of not rescuing, the bank's business prospects must be good, and the bank must hand over its documents to the LPS (Article 24(1)). If the LPS decides not to rescue the bank, it can call on Bank Indonesia to revoke the bank's licence (Article 31).

For failing banks with systemic impact, shareholders must agree at a general shareholders meeting to hand over management to the LPS, and they must be prepared to provide 20 per cent of the rescue costs (Article 33(1) of the LPS Law). The LPS must sell all shares in the rescued bank within three years of the rescue occurring, with the possibility of two one-year extensions (Article 38). The LPS can rescue a bank without the involvement of shareholders (Article 39). If it does so, it will assume the rights and responsibilities of the general shareholders meeting, owners, directors, and other interested parties (Article 40).

According to the LPS, the only bank with a systemic impact rescued in recent years was Bank Century. Since 2006, seventy banks with non-systemic impact have been, or are being, liquidated.[76]

Consumer protections

From 2013 to mid-2016, the OJK received more than 3,800 complaints against financial institutions, more than half of which were banks.[77] The OJK has made policies and issued regulations to improve consumer protection in the industry. Most significant is OJK Regulation 1 of 2013 on Consumer Protection in the Financial Services Sector.[78] Under the regulation, businesses that offer financial services (including banks) must provide information about their products and services that is accurate, honest, clear, not misleading, current, and easily accessible (Articles 4(1) and 5). Businesses must also help consumers understand their rights and responsibilities (Article 9), and have mechanisms for receiving and handling consumer complaints (Article 32(1)).

Banks must generally respond to consumer complaints within twenty days (Article 35). They must investigate these complaints, and if they are true, apologize and offer redress or a remedy, or improve the product or service (Article 38).

If the complaint cannot be resolved, the consumer can either ask the OJK to facilitate a dispute resolution process, or pursue the complaint through the courts (Article 39).

[76] See <http://www.lps.go.id/web/guest/bank-yang-dilikuidasi>.

[77] Dina Rayanti, 'OJK Tangani 3.805 Aduan Layanan Jasa Keuangan, Bank Paling Banyak Diadukan' *Detik Finance* (4 June 2016) <https://finance.detik.com/moneter/3225536/ojk-tangani-3805-aduan-layanan-jasa-keuangan-bank-paling-banyak-diadukan>.

[78] OJK Circular Letter 2 of 2014 on Services and Settlement of Consumer Complaints about Financial Services Business Actors implements part of the 2013 Regulation.

Dispute resolution

Disputes between customers and banks can be resolved by mediation, conciliation, and arbitration. The OJK offers consumer dispute resolution services and can conduct specific investigations and verifications to assist with that process.[79]

Anti-money laundering measures

All banks must implement programmes directed at detecting money laundering and terrorism financing (Articles 2 and 3 of Bank Indonesia Regulation on Money Laundering and Terrorism Financing).[80] Banks are not to open or maintain accounts that are anonymous or in fictitious names. They must request detailed information to verify a customer's identity and must scrutinize the validity of such information. Banks also need to meet face-to-face with prospective customers to ascertain the accuracy of the information provided (Article 12).

Banks must profile and classify their customers based on risk levels for money laundering or terrorist funding (Article 11). They also need to report suspicious transactions to the Financial Transaction Reporting and Analysis Centre (*Pusat Pelaporan dan Analisis Transaksi Keuangan*, PPATK) (Article 48).[81] Bank Indonesia must report cash transactions exceeding Rp 500 million in a single day to the PPATK, and transactions to and from overseas (Article 23(1) of the Money Laundering Law).[82] Banks can delay transactions for up to five days or cancel them if they appear to be associated with criminal activity (Article 26).

Money laundering attracts up to twenty years' imprisonment and Rp 10 billion in fines (Article 3 of the Money Laundering Law). Similar punishments apply to anyone who covers up or disguises money flows they know, or suspect, are proceeds of crime (Article 4).

RURAL BANKS

In May 2017, there were 1,619 rural banks in Indonesia, and 167 rural shari'a banks.[83] Despite their large number, rural banks hold less than 2 per cent of the assets of commercial banks.[84] They are designed primarily to provide financing for small and medium enterprises. Rural banks can:

- mobilize funds from the public for term deposits, saving deposits, and equivalents;
- provide credit;
- provide finance based on shari'a principles; and
- place funds in Bank Indonesia certificates, term deposits, certificate deposits, or saving deposits in other banks.

They are prohibited from: providing facilities for demand deposits or participating in demand deposit transactions; and from conducting business in foreign exchange, participating in equity markets or conducting insurance business (Article 14). Rural banks are restricted to opening branches in the same province as their head office.[85]

[79] Art 29(3), OJK Law.

[80] Bank Indonesia Regulation on 14/27/PBI/2012 on the Implementation of Anti-money Laundering and Combating the Financing of Terrorism Programs for Commercial Banks.

[81] Also regulated under Art 23(1), Law 8 of 2010 on Prevention and Eradication of Money Laundering.

[82] Law 8 of 2010 on the Prevention and Eradication of Money Laundering.

[83] OJK, *Statistik Perbankan Indonesia 2017*, vol 15 (Otoritas Jasa Keuangan 2017) 134; OJK, *Statistik Perbankan Syariah 2017*, vol June (Otoritas Jasa Keuangan 2017) 99.

[84] OJK, *Statistik Perbankan Indonesia 2017* (n 84) 2.

[85] Art 31(1), Bank Indonesia Regulation 8/26/PBI/2006.

Legal form and ownership

Rural banks can be established as a regional development enterprise, a cooperative, a limited liability company, or any other legal form (Article 21(2) of the Banking Law). They cannot be foreign-owned (Article 23).

Lending restrictions

The same restrictions on lending to related parties and on single party loans applicable to commercial banks also apply to rural banks (Articles 8, 11, and 15 of the Banking Law).

ISLAMIC BANKING

Indonesia was a relative latecomer to Islamic banking. Soeharto's government only formally recognized it in 1983, around the same time Malaysia's first Islamic bank was established but over a decade after Egypt established the world's first modern Islamic bank in 1971. Bank Muamalat, the first fully fledged official Islamic bank in Indonesia, only opened in 1991. A legislative basis for Islamic finance, albeit nominal, came the following year, when Law 7 of 1992 on Banking was passed.

Since then, Islamic banking has developed steadily in Indonesia and a specific-purpose statute was passed in 2008: Law 21 on Islamic Banking. Relative to Indonesia's Muslim population, the Islamic banking sector remains small. It has a market share of about 5 per cent of the overall banking sector.[86] The overwhelming majority of Indonesian Muslims continue to use conventional banking services. Despite this, because Islamic banking transactions are based on a religious prohibition on earning and paying *riba*, commonly understood as any form of interest, it has been necessary to create a separate regulatory framework for Islamic banks, albeit one nesting within the framework of the wider banking system.[87]

The Islamic banking sector has two principal regulators: the National Shari'a Council (*Dewan Syariah Nasional*), a division of the Indonesian Ulama Council (*Majelis Ulama Indonesia*, MUI), and the OJK. The National Shari'a Council decides how Islamic principles should apply to often-complex banking transactions and provides doctrinal direction to banks through the issuance of *fatwa* (Islamic legal opinions), which are treated as authoritative. The Directorate of Shari'a Banking at Bank Indonesia primarily dealt with prudential aspects of Islamic banking but this role was transferred to OJK in 2013.

Every commercial bank with an Islamic banking unit must form a shari'a supervision board, appointed by the general meeting of shareholders on the recommendation of the National Shari'a Council. Supervision boards advise the board of directors and monitor the bank's activities to ensure compliance with shari'a principles (Article 32 of the 2008 Islamic Banking Law).

Activities and defining features

Article 1(12) of the Islamic Banking Law defines shari'a principles as Islamic legal principles based on fatwa produced by institutions that have authority to issue them. While a number of institutions issue fatwa in Indonesia, only the National Shari'a Council's fatwa have effect in Islamic banking (Article 26(2) of the Islamic Banking Law).

[86] PwC, *Indonesia Banking Survey 2017* (PwC 2017) 10 <https://www.pwc.com/id/en/publications/assets/financialservices/ibs-2017.pdf>; OJK, *Statistik Perbankan Indonesia 2017* (n 84) 36.

[87] For this and the preceding paragraph, see Tim Lindsey, *Islam, Law and the State in Southeast Asia: Volume 1 Indonesia* (IB Tauris 2012) 189–90.

Article 2 of the Law sets out the normative foundations of Islamic banking as '*shari'a* principles, economic democracy and the principle of precaution'. Business transactions based on shari'a principles are described as those not: containing *riba* (interest), *maisir* (uncertainty), or *gharar* (speculation); involving goods or services that are *haram* (prohibited according to Islam); or constituting *zalim* (transactions that produce injustice between the parties).[88] 'Economic democracy' embodies the values of 'justice, partnership, equality and utility'.[89]

Most prudential regulations that apply to conventional banks also apply to Islamic banks. However, when dealing with credit and financing provisions, exceptions have been made for Islamic banks. Applying uniform credit controls across the diverse array of Islamic financial instruments (see below) has proved challenging.

Islamic finance instruments

As mentioned, Indonesia's Islamic banking sector enforces a prohibition on *riba*. The meaning of this term is complex and contested within Islamic jurisprudence and is broadly defined in Article 2 of the Islamic Banking Law. It is, however, generally understood in Indonesia as chiefly referring to interest. Instead of conventional loans, the sector therefore provides a variety of alternative financing arrangements. Article 1(25) of the Islamic Banking Law recognises the following:

- *Murabahah*—a financing instrument used for asset or property financing. The financer purchases the asset on behalf of their customer and sells it back to him or her in instalments at a fixed margin, sometimes with additional service fees. This is the most commonly adopted financing instrument.
- *Mudarabah*—a profit-sharing mechanism whereby the customer enters a partnership with the financier. The customer provides the human resources, work, and management, while the financier provides the capital investment. Profits arising from the joint investment are shared according to a pre-determined ratio, and both the financier and the recipient share the risks involved in the investment, making the arrangement more equitable. These profit-loss sharing mechanisms are not used as commonly as those with fixed margins, as they are really only suitable for businesses rather than consumer lending.
- *Ijarah*—rent-to-buy transactions, usually selling the benefit or use of an asset, such as equipment or a vehicle, at a fixed price, paid in instalments. Ijarah can also be used to rent services.
- *Purchase and sale financing* including murabahah, *salam* (advanced payments), and *istishna* (financing in stages for manufacturing, construction, and other multi-stage projects).
- *Qardh*—an interest-free loan, where the debtor is only required to repay the amount borrowed and no margin above the principal is payable. In practice, service fees are usually applied, often at a rate comparable to commercial interest rates.

Investment in Islamic banks

Bank Indonesia's consent must be obtained to purchase controlling shares in an Islamic bank. This will be not be granted unless the potential shareholder has passed a 'capacity and

[88] Elucidation to Art 2, Law on Islamic Banking.
[89] Elucidation to Art 2, Law on Islamic Banking.

appropriateness' test administered by Bank Indonesia (Article 27(1) of the Islamic Banking Law). A controlling shareholder that fails this test must reduce any ownership to a maximum of 10 per cent of shares (Article 27(2)).

Dispute resolution

Article 55 of the Islamic Banking Law provides that Islamic banking disputes fall under the jurisdiction of the religious courts. Law 3 of 2006 amending Law 7 of 1989 on the Religious Courts confirms this, expressly granting these courts jurisdiction over the 'syari'ah economy' (Article 49).[90] This phrase is, in turn, defined very broadly as anything carried out 'in accordance with syari'ah principles' in a general sense, including shari'a banking, microfinance institutions, insurance, reinsurance, mutual funds, obligations and medium-term notes, securities, financing, pawnbroking, financial institutions, pension funds, and businesses (elucidation to Article 49).

However, the Islamic Banking Law allows bank contracts to specify alternative dispute resolution procedures, provided they do not contravene shari'a principles (Article 55(2)–(3)). The elucidation to the Islamic Banking Law adds that disputes can be settled either through 'consensus building deliberations' (*musyawarah untuk mufakat*), bank mediation, the National Shari'a Arbitration Board (*Badan Arbitrase Syariah Nasional*, BASYARNAS),[91] or other arbitration bodies, or by the courts. A number of National Shari'a Council fatwa direct that, should negotiations fail, parties must proceed to the National Shari'a Arbitration Board. Bank Indonesia also offers mediation services for banking disputes.

These multiple avenues for the resolution of Islamic banking disputes have caused concern about overlaps in authority and legal uncertainty.[92] A fundamental challenge for Islamic banking disputes is that while the religious courts and Islamic bodies have limited experience with commercial contract law, the general courts and Bank Indonesia dispute resolution bodies have limited experience applying Islamic principles. For this reason, Islamic finance disputes are very often resolved without recourse to the judicial system at all.

[90] This Law was amended for a second time by Law 50 of 2009.

[91] BASYARNAS was formerly known as BAMI (*Badan Arbitrase Muamalat*, Muamalat Arbitration Body). It is an independent body established by MUI in October 1993 as the specific-purpose arbitration body for Islamic finance disputes, although it can also decide conventional banking disputes. It has not, however, been active. From 1997 to 2009, for example, it decided only seventeen cases: Yogie Respati, 'Basyarnas Sosialisasi Penyelesaian Sengketa Muamalah' *Republika* (28 September 2010).

[92] 'Dualisme Penyelesaian Sengketa Perbankan Syariah' *Hukumonline* (1 May 2009).

20

Competition Law

INTRODUCTION

The main source of competition law in Indonesia is Law 5 of 1999 on the Prohibition of Monopolistic Practices and Unhealthy Competition. The first part of this chapter summarizes key provisions of this statute, while the second examines the institution it establishes to regulate markets in Indonesia—the Commission for the Supervision of Business Competition (*Komisi Pengawas Persaingan Usaha*, KPPU).

Indonesia's Competition Law was passed during the catastrophic economic crisis that began in 1997 and led to the collapse of Soeharto's New Order in May the following year. Under Soeharto, Indonesia had become world famous for an almost-complete absence of meaningful business competition, the grant of sweeping monopolies to the president's family members and inner circle, and a resulting extreme concentration of market power in the hands of that group. During his regime, Soeharto's children became very wealthy, and their 'flagrant arrogance' towards 'both law and polite behaviour' made them synonymous with 'greed and impunity'.[1] One notorious example was the president's son, Hutomo Mandala Putra, commonly known as Tommy, being granted monopoly rights to purchase and sell cloves—the key ingredient of Indonesia's hugely popular *kretek* cigarettes—through an agency he controlled, backed by a low interest liquidity loan of US$345 million from the central bank, Bank Indonesia. Grower resistance to Tommy's resulting complete dominance of this market, and thus the low prices they were paid, was crushed by government pressure.[2]

Although some had agitated for competition law reform before the 1997 crisis, the Competition Law's enactment, and its content, was largely the result of International Monetary Fund (IMF) and World Bank pressure. These institutions demanded a new statute as a condition for Indonesia receiving a financial rescue package. As is well-known, IMF-led lenders dominated Indonesia's legislative and policy agenda after Soeharto's fall, with many statutes enacted in 1998 and 1999 being less concerned with meeting domestic policy objectives and more concerned with meeting IMF demands that Indonesia re-invent its economic regulatory and institutional models in line with the so-called 'Washington Consensus'. This was a set of ideas about deregulation and governance reform that the IMF and other creditors saw as broadly applicable to most developing countries, and it included competition regulation.[3] A troupe of foreign lawyers and competition experts then helped design a competition law regime that sought to unravel the worst excesses of Soeharto-era crony capitalism and prevent new abuses. They drew on range of existing competition laws, including German and Australian statutes, and the United Nations Conference on Trade and Development (UNCTAD) model law.[4]

[1] Tim Lindsey and Mas Ahmad Santosa, 'The Trajectory of Law Reform in Indonesia: A Short Overview of Legal Systems and Change in Indonesia' in Tim Lindsey (ed), *Indonesia: Law and Society* (2nd edn, Federation Press 2008) 11.

[2] Richard Robison and Vedi R Hadiz, *Reorganising Power in Indonesia: The Politics of Oligarchy in an Age of Markets* (Routledge 2004) 88. As the authors point out on p 101, 'When asked why it was he who acquired the monopoly, Tommy suggested reporters should ask his father'.

[3] This paragraph draws on Lindsey and Santosa (n 1) 13.

[4] Yasuda Nobukyuki, 'The Evolution of Competition Law in Southeast Asian Countries' (2003) *International Institute for the Sociology of Law* 12.

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Unlike some other reforms of this period,[5] the Competition Law is generally considered reasonably sound and comprehensive by world standards.[6] It distinguishes between three broad categories of prohibition: anti-competitive agreements (Section III, Competition Law); anti-competitive business activities (Section IV, Competition Law); and abuse of dominant market positions (Section V, Competition Law).

Before describing these prohibitions, we note that they apply to conduct that results in unhealthy competition or monopolistic practices, but which itself is not necessarily illegal per se. As we explain below, most of the prohibited conduct and agreements will not result in liability unless they 'result in monopolistic practices or unhealthy competition'. The Organisation for Economic Cooperation and Development (OECD) has therefore argued that the Law should be strengthened by making certain prohibited conduct, such as the formation of cartels, strictly illegal. This would remove the need to demonstrate that the conduct has anti-competitive results to sanction it.[7] Other criticisms are that important terms used in the Law are not adequately defined, and that many offences overlap, creating the potential for inconsistent decisions.[8] As we show below, this is particularly true of the dominant market position provisions.

Anti-competitive agreements

This section covers both written and verbal agreements, provided that the parties intend to create obligations that bind each other (Article 1(7)). 'Unhealthy competition' is defined as competition between businesses in the production or distribution of goods or services that is carried out dishonestly or illegally, or which interferes with business competition (Article 1(6)). 'Monopolistic practices' occur when one or more businesses that enjoy a concentration of economic power that allows them to control production and distribution of a good and/or service, causing unhealthy competition and detriment to the public interest (Article 1(2)).

Oligopolies

Businesses must not make agreements with other businesses to jointly control production or marketing of goods or services that result in monopolistic practices or unhealthy competition (Article 4(1)). Where two or three businesses, or a group of businesses, control more than 75 per cent of a market segment for a particular good or service, they are presumed to exercise this control (Article 4(2)).

Price fixing

Businesses are prohibited from making price fixing agreements with their business competitors for particular goods or services (Article 5(1)). Exceptions apply if businesses are part of the same venture, or the agreement is authorized by law (Article 5(2)). Businesses must also not make discriminatory pricing agreements (Article 6), predatory pricing agreements to fix prices below market value resulting in unhealthy competition (Article 7), or minimum re-sale pricing agreements (Article 8).

[5] The IMF-backed bankruptcy reforms of this period have, for example, been the subject of particular criticism—see Chapter 19 and Timothy Lindsey, *Indonesia: Bankruptcy, Law Reform & the Commercial Court: Comparative Perspectives on Insolvency Law and Policy* (Desert Pea Press 2000); Tim Lindsey, 'The IMF—and Insolvency Law Reform in Indonesia' (1998) 34 *Bulletin of Indonesian Economic Studies* 119.

[6] See, for example, Organisation for Economic Co-operation and Development, *OECD Reviews of Regulatory Reform: Indonesia 2012: Strengthening Co-Ordination and Connecting Markets* (2012) 24.

[7] ibid 25. [8] ibid 28.

Market share or segmentation agreements

Businesses must not make agreements with competitors to divide up markets by region or market segment for goods and/or services, thereby causing monopolistic and/or anti-competitive conduct (Article 9).

Refusal to supply goods or services

Businesses are prohibited from making agreements with business competitors to obstruct other businesses in the same sector, domestically or overseas (Article 10(1)). These include agreements refusing to sell to another enterprise if this will cause loss or probable loss to the other business, or will restrict the other business in selling or purchasing goods and services in the relevant market (Article 10(2)).

Cartels

Businesses must not make agreements with business competitors intended to influence prices by regulating production, and/or distribution of a particular good or service, if this could result in monopolistic practices or unhealthy competition (Article 11).

Trust agreements

Businesses are prohibited from agreeing with other businesses to form trade associations or large entities that aim to control production and/or distribution of particular goods and/or services, if this could result in monopolistic practices or unhealthy competition (Article 12).

Oligopsonies

Businesses must not make agreements with other businesses that seek to control procurement or receipt of orders so as to control the price of the relevant good or service, if this could cause monopolistic practices or unhealthy competition (Article 13(1)). Businesses are presumed to collectively control procurement if two to three businesses, or a group of businesses, control more than 75 per cent of the market for a particular good or service.

Vertical integration

Businesses must not make agreements with other businesses that seek to control production of certain goods, including the supply chain of particular goods or services, if this could result in unhealthy competition or losses to the broader community (Article 14).

Exclusive dealing agreements

Businesses are prohibited from making agreements with other businesses that require the purchaser of goods and services to only supply, or not to supply, certain parties or places (Article 15(1)). Businesses are also prohibited from making agreements with other businesses that require purchasers to purchase other goods or services from the supplier (Article 15(2)). Businesses must not agree to impose conditions on a price or discount that requires purchasers to buy other goods or services from the supplier or not to purchase the same or similar products or services from the supplier's competitor (Article 15(3)).

Agreements with foreign parties

Businesses must not enter agreements with overseas parties that could result in monopolistic practices or anti-competitive behaviour (Article 16).

Anti-competitive activities

Monopolies

Businesses must not exercise control over the production or distribution of goods or services, if this leads to monopolistic practices or unhealthy competition (Article 17(1)). A business is presumed to exercise such control if:

- there is not yet a substitute for the relevant good or service;
- it has prevented other businesses from competing in the market for the same goods or services; or
- it, or a group of businesses, controls more than 50 per cent of the market for the particular good or service (Article 17(2)).

Articles 19 to 21 prohibit a range of activities aimed at preventing competition, including opposing or obstructing competitors, preventing customers from accessing the competitor (Article 19), or selling stock at a loss to price a competitor out of the market (Article 20).

As mentioned, some of these provisions overlap with provisions dealing with abuse of dominant position, discussed below.[9]

Monopsonies

Businesses are prohibited from dominating procurement, or becoming the sole buyer, of a good or service, if this could result in monopolistic practices or unhealthy competition (Article 18(1)). A business is presumed to control procurement if it, or a related business group, controls over 50 per cent of the market for the good or service (Article 18(2)).

Conspiracy

Businesses must not conspire with other parties to determine or fix the winning bid in a tendering process, if this creates unhealthy competition (Article 22). Businesses also must not conspire with others to obtain confidential information from their competitors (Article 23) and must not obstruct the production and distribution of competitors' goods and services (Article 24).

Dominant position

A business has a dominant position if it, or a business group, controls at least 50 per cent of the market for a particular good or service; or if two or three businesses, or a group of businesses, control 75 per cent or more of the market (Article 25).

Businesses must not misuse their dominant position to set conditions of trade that seek to prevent or obstruct consumers from obtaining a competitor's goods and services, restrict the market and technological development, or obstruct other businesses from competing in the same market (Article 25(1)).

[9] ibid.

Dual directorship

Company directors or commissioners must not hold board positions in more than one company: if the companies operate in the same market; are closely connected in the same business type or sector; or control the market for certain goods or services (Article 26).

Shareholdings

Businesses must not hold majority shares in other businesses, or business groups, operating in the same sector within the same market, if this results in a business or business group holding over 50 per cent of the relevant market share, or in two to three businesses controlling over 75 per cent of the relevant market share (Article 27).

Mergers and acquisitions

Businesses must not carry out mergers, amalgamations, or acquisitions that could result in monopolistic practices or unhealthy competition (Article 28). Mergers and acquisitions are subject to Government Regulation 57 of 2010 on Integration or Consolidation Mergers and Takeovers Resulting in Monopolistic Practices and Unhealthy Competition. According to this Regulation, unhealthy competition occurs if a business involved in a merger or acquisition makes an illegal contract, engages in illegal activities, or exploits a dominant position (Article 2(2)). The KPPU can assess whether businesses have done this by analysing market concentration, barriers to entry, and the potential for anti-competitive behaviour, efficiency, and bankruptcy (Article 3(1)–(2)). The KPPU can penalize companies involved in takeovers or mergers that result in anti-competitive or monopolistic behaviour (Article 4(1)).

Merger consultation and notification

Businesses that, because of mergers, amalgamations, or acquisitions, come to possess Rp 2.5 trillion in assets or Rp 5 trillion in market value (except banks, where the asset value must exceed 20 trillion) must notify the KPPU within thirty days (Article 5 of Government Regulation 57 of 2010; Article 29 of the Competition Law). A business's assets and sales include those of its subsidiaries. Entities that fail to notify can be fined up to Rp 1 billion for each day past the deadline, up to a maximum of Rp 25 billion (Article 6 of Government Regulation 57 of 2010). If a merger or acquisition is likely to result in a business's asset base exceeding the threshold amount, the business can first consult the KPPU (Article 10 of Government Regulation 57 of 2010). Following consultation, the KPPU may offer suggestions, guidance, or a written opinion, although the Regulation specifies that this input is not approval or rejection of merger plans (Article 11(2) and (4)).

The KPPU can make one of three findings about the merger after post-merger notifications: that it has no anti-competitive effect; that no anti-competitive effect will eventuate if KPPU-imposed conditions are met; or that there is anti-competitive effect.

One problem with these rules is that they only require notification *after* a merger that causes a business to exceed the threshold, rather than before. While Indonesia's model is efficient—because it does not require formal pre-approval for mergers and acquisitions—it also creates significant risks that an inappropriate merger may be difficult to unravel. Once complete, undoing a merger can be difficult, and can harm customers, employees, and creditors. The KPPU has complained that the post-notification system provides no incentives for companies to be cooperative, because they know that rejecting a merger is almost

impossible.[10] The KPPU has targeted the notification system in any future amendment to Law 5 of 1999.[11]

The Commission first penalized a company for failing to notify in December 2012.[12] PT Mitra Pinasthika Mustika notified the Commission thirty-five days after acquiring PT Austindo Nusantara Jaya Rental (a local leasing company). The KPPU fined Mitra Pinasthika Mustika Rp 4.6 billion, preferring not to impose the maximum, because the company was cooperative and responsive throughout proceedings. In its 2015 Annual Report, the Commission reported receiving thirty-seven notifications and zero consultations; and in 2014, fifty-two notifications, and four consultations.[13]

Over the past few years, the KPPU has noted that the plantations and financial sectors have been responsible for the most mergers, with the telecommunications sector also featuring prominently in 2014 and 2015. One of the most prominent recent cases handled by the KPPU involved PT XL Axiata (XL) acquiring a 95 per cent stake in mobile operator PT Axis Telekom Indonesia. This resulted in XL controlling 26 per cent of the telecommunications market. In its 2014 annual report, the KPPU noted that this acquisition resulted in XL, Telkomsel and Indosat together controlling 89.5 per cent of the telecommunications market, which would appear to violate the provisions in Law 5 of 1999 relating to oligopolies. The KPPU said that to prevent unhealthy business competition, it would closely monitor the sector and require XL to submit three-monthly reports on the development of its business, products and tariffs for the next three years.[14]

Exceptions to the Competition Law

The Law's prohibitions do not apply to:

a. conduct and/or agreements intended to implement existing law;
b. agreements related to intellectual property rights such as licenses, patents, trademarks, copyright, industrial design, integrated layouts of electronic circuits and trade secrets, and franchises;
c. agreements providing for technical standardization of goods or services that do not hamper competition;
d. agency agreements that contain no provisions for reselling goods or services at a price lower than the price in the agreement;
e. cooperative research agreements intended to increase or improve broader community living standards;
f. international agreements ratified by the Indonesian government;
g. agreements or actions aimed at exports that do not compromise domestic needs or market supply;
h. small businesses; or
i. cooperatives that specifically aim to serve members (Article 50).

The UNCTAD has criticized these exceptions for using 'broad or undefined concepts, making the provisions unclear,' and the Law itself for employing vague terminology that

[10] KPPU, *Laporan Tahunan KPPU 2014* (KPPU 2015) 67.
[11] ibid 27.
[12] Competition Commission Decision 09/KPPU-M/2012.
[13] KPPU, *Laporan Tahunan KPPU 2015* (KPPU 2016) 25.
[14] KPPU (n 10) 67.

undermines its effectiveness.[15] The *Donggi-Senoro* case demonstrates that businesses have become adept at exploiting the Law's technical loopholes and vagueness.

DONGGI-SENORO CASE

This case involved a tender to participate in the Donggi-Senoro liquified natural gas (LNG) project in Central Sulawesi. In early 2005, LNG International signed an agreement with Indonesian state-owned oil and gas company Pertamina and gas exploration company PT Medco Energi International, and its subsidiary PT Medco E&P Tomori Sulawesi, to develop a gas block in Central Sulawesi. In line with this agreement, LNG International formed a local subsidiary with an Indonesian partner—PT LNG Energi Utama (PTLNG)—to develop the project. When exploring whether it wished to buy LNG from PTLNG, Japan's Mitsubishi Corporation performed a due diligence review of the company, which involved access to its technical and financial information.[16]

In late 2006, however, Pertamina and Medco opened tenders for the project, although the process was formally called a 'beauty contest'. Mitsubishi was accused of colluding with Pertamina and Medco to win the bid to develop the gas block. The three firms were accused of contravening Article 22 of the Competition Law, which prohibits conspiracy to fix tendering processes. They were also accused of violating Article 23, which prohibits conspiracy to obtain confidential information about a competitor, giving rise to unhealthy competition, in this case, the data and information Mitsubishi obtained about LNG International/PTLNG.

The KPPU examined the case following a request from LNG International. The Commission held that, despite its name, the 'beauty contest' was, in fact, a tender process, defined in the Law as 'an offer proposing a price to do work, produce goods, or provide services' (Article 22 and its elucidation). Accordingly, it dismissed Pertamina's argument that a 'beauty contest' was not a 'tender' under Article 22 of the Competition Law. It also dismissed Pertamina's claim that it had simply chosen a partner with whom to enter into a joint venture.

The Commission found that the tendering process was rigged because it provided Mitsubishi with numerous unfair advantages. These included a notice time longer than for most other bidders prior to the tender submission deadline; and meetings with Pertamina prior to, and during, the tender process. The KPPU also found that the terms of reference were unclear, and the ranking system used by Pertamina and Medco differed, which did not allow accurate comparison of tenders.

The KPPU ordered Pertamina to pay a fine of Rp 10 billion, PT Medco Energi International Rp 5 billion, its subsidiary Rp 1 billion, and Mitsubishi Corporation Rp 15 billion. The KPPU did not, however, cancel the tender award and the parties proceeded with the project. The Central Jakarta District Court upheld the Commission's decision in November 2011[17] but in July the following year the Supreme Court overturned it, accepting the appellants' argument that a 'beauty contest' was not a 'tender', despite the plain words of Article 22 and its elucidation.

Donggi-Senoro began full operations in 2014. It is reported to be the largest infrastructure project in Indonesia after the Tangguh LNG plant in Papua. Some have claimed that political pressure from powerful groups wishing to provide certainty to project

[15] United Nations Conference on Trade and Development, *Voluntary Peer Review on Competition Policy: Indonesia* (United Nations 2009) 15.

[16] LNG International, 'Letter of Claim Issued to Mitsubishi Corporation' (2011) *Press Release* <http://www.lnglimited.com.au/irm/PDF/1552_0/LetterofClaimIssuedtoMitsubishiCorporation>.

[17] Central Jakarta District Court Decision 34/KPPU/2011/PN.JKT.PST.

investors helped motivate the Supreme Court's decision to overturn the Commission's findings.[18]

THE COMPETITION COMMISSION

Section IV of the Competition Law establishes the Commission for the Supervision of Business Competition (*Komisi Pengawas Persaingan Usaha*, KPPU). The KPPU began operating in 2000. It is an independent body, separate from the judiciary, executive, and legislature (Article 30(2)). It is, however, accountable to each of these government arms. For example, the KPPU must submit reports to the *Dewan Perwakilan Rakyat* (DPR, People's Representative Assembly), which also approves its budget (Articles 35(g) and 37). The president of Indonesia oversees the appointment and dismissal of commissioners (subject to DPR approval) (Article 31(2)) and the judiciary hears appeals from KPPU decisions (Article 44(2)). The KPPU is also accountable to the public in the sense that it must publish its decisions.[19]

In its early years, controversy arose about whether the Commission, statutorily entrusted to 'adjudicate facts and interpret [the Competition Law] in making decisions in cases' (Article 36(d), (j), and (l) of the Competition Law), was really a judicial body.[20] The Commission initially thought that it was because it included the '*irah-irah*' in its decisions. These are the words *Demi Keadilan Berdasarkan Ketuhanan yang Maha Esa*, which mean 'For Justice, based on Almighty God', and appear at the head of all court decisions.

However, the Supreme Court soon disabused the KPPU of this notion. In the *Indomobil* case,[21] the Supreme Court cancelled a KPPU decision on several grounds, including its use of the *irah-irah*, which the court held to be wrongful and beyond the KPPU's powers.[22]

Tasks and authority

The KPPU's primary tasks include:

- assessing whether agreements and business activities are anti-competitive, or whether an abuse of dominant position has occurred;
- acting against potential violations;
- advising on government policies related to monopolistic and anti-competitive practices;
- issuing directives and information about competition law; and
- preparing periodic reports on its achievements for the president and the DPR (Article 35).

Under Article 36, the Commission has power to:

- receive reports from the community or business about suspected monopolistic or anti-competitive practices, and independently examine the reports of those practices (Article 36(a) and (b));
- investigate cases, including by calling suspected companies, witnesses, and experts, and examining company documents (Article 36(c), (e), and (f));

[18] 'Putusan KPPU Atas Proyek Donggi-Senoro Ancam Kepastian Hukum di Industri Migas' *Detikfinance* (11 April 2012).

[19] However, the KPPU is not required to make its annual reports publicly available.

[20] J Davis, 'The Competition Commission: A New Kind of Player in Indonesia's Legal System' in Tim Lindsey (ed), *Indonesia: Law and Society* (2nd edn, Federation Press 2008) 640.

[21] Supreme Court Decision 01/K/KPPU/2002. [22] ibid.

- draw conclusions from those investigations about whether monopolistic or anti-competitive practices exist (Article 36(d));
- request the assistance of police investigators to compel the appearance of businesses, witnesses, and experts who refuse to cooperate (Article 36(g));
- request explanations from government departments or institutions (Article 36(h));
- obtain, inspect, and assess documents or other evidence for their investigations (Article 36(i));
- assess any loss incurred by certain parties or society (Article 36(j));
- publish KPPU decisions about businesses that have engaged in monopolistic or anti-competitive practices (Article 36(k)); and
- impose sanctions on businesses or business actors who have contravened competition laws (Article 36(l)).

Reporting anti-competitive behaviour

Anyone who knows of, or suspects, anti-competitive or monopolistic practices—or has incurred losses from such behaviour—can complain to the KPPU (Article 38(1)–(2)). Complainants can be anonymous.

Preliminary investigations

The Commission must conduct a preliminary investigation within thirty days of receiving a complaint. It must then decide whether to continue to the 'advanced investigation' stage (Article 39), discussed below. The KPPU can also initiate its own investigations, without receiving a formal complaint (Article 40), if it suspects a contravention of the Competition Law. The KPPU rarely does this. In 2015, for example, it initiated only ten cases.[23]

Advanced investigations

During this stage, the KPPU can directly investigate the suspected business and witnesses (Article 39). Advanced investigations must conclude within sixty days, with a possible extension of thirty days (Article 43(1)–(2)). The KPPU then has another thirty days to decide whether the Competition Law has been violated (Article 43(3)). This decision must be read at a formal session open to the public (Article 43(4)). If the KPPU decides that a business has violated the Competition Law, that business has thirty days to comply with the Commission's decision (Article 44(1)). If the business wishes to appeal, the appeal must be made to the district court within fourteen days of the decision (Article 44(2)).

Some observers have argued that these timelines are too tight to enable completion of comprehensive investigations, particularly if investigations are highly complex, as is often the case.[24]

Investigative powers

Businesses under investigation must cooperate with the KPPU by handing over requested evidence and information (Article 41(1)–(2) of the Competition Law). Commission investigators do not, however, have authority to conduct searches, wiretap, make arrests, or seize evidence. To overcome this, the KPPU generally seeks the assistance of police

[23] KPPU (n 13) 14. [24] See, for example, OECD (n 6) 36.

investigators,[25] who, ultimately, have power to take over the case (Article 41(3)). It also sometimes imposes lighter penalties on cooperative parties, even though it has no formal power to do this.

Appeals

Appeals from the KPPU can be lodged with a district court[26] within fourteen days of the KPPU's determination (Article 44(2) of the Competition Law). Supreme Court Regulation 3 of 2005 provides that the appeal should be lodged at the district court where the business is domiciled (Article 2(1)). The district court then has fourteen days to begin examining the business's objection to the KPPU determination, and must issue a decision within thirty days of beginning that examination (Article 45(2)). The case must, as far as possible, be handled by judges with 'sufficient knowledge' of competition law (Article 5(1) of the Regulation). Parties dissatisfied with the district court decision have fourteen days to appeal to the Supreme Court, which must decide the appeal within thirty days of receiving the appeal (Article 45(4) of the Competition Law). KPPU decisions that are not appealed are legally binding and can be executed by a district court (Article 46).

Like the time limits for KPPU decision-making, these seem designed to ensure that cases proceed expeditiously. However, they are arguably also too short to enable proper consideration of the complex technical issues many of these cases present.[27]

Case data

In recent years, the KPPU's annual reports have presented the Commission's investigation and case loads inconsistently, making evaluations of its performance from year to year difficult. As a result, we only discuss here the data presented in the 2015 KPPU Annual Report. As for investigations, in 2015, the Commission received 136 complaints, of which sixty-six (or 49 per cent) related to tender processes and seventy to other issues. When the report was produced, only twenty-two complaints had progressed to the preliminary investigation stage, eighteen were still being processed, while ninety-six were considered incomplete or inappropriate for follow up.[28]

As for decisions, the 2015 Report states that the KPPU issued 199 in the period from 2007 to 2015,[29] though the outcomes of those decisions are unclear. Of all Commission decisions made between 2002 and 2015, 129 were appealed to the district court and, of those, a further 110 went on to cassation appeal to the Supreme Court. At the district court level, only seventy-four of the 129 decisions were upheld in full, while fifty-five cases were overturned.[30]

Remedies and sanctions

The KPPU can impose various administrative sanctions (Article 47(1)), including:

- invalidating agreements that violate provisions of the Competition Law (Article 47(2)(a), (b));
- ordering businesses to cease activities that give rise to monopolistic or anti-competitive practices or cause detriment to society (Article 47(2)(c)) and to cease abuses of a dominant position (Article 47(2)(d));

[25] The KKPU has a Memorandum of Understanding with the police to this effect.

[26] In 2003, the Supreme Court declared that the KPPU's decisions were not 'administrative decisions' and could, therefore, not be appealed to the administrative courts: Supreme Court Decision 01/K/KPPU/2003. This was not really in dispute, however, given that the Competition Law clearly states that appeals from the KPPU go to the district courts.

[27] OECD (n 6) 37–38. [28] KPPU (n 13) 13. [29] ibid 15. [30] ibid 16.

- cancelling any merger, amalgamation, or acquisition (Article 47(2)(e));
- determining compensation (Article 47(2)(f)); and/or
- imposing a fine of between Rp 1 billion and Rp 25 billion (Article 47(2)(g)).

Some infringements of the Competition Law can incur criminal penalties. For example, violating the prohibitions on oligopolies, cartels, trust agreements, oligopsonies, monopolies, abuse of dominant position, anti-competitive shareholding, and anti-competitive mergers and acquisitions, attract fines ranging from Rp 25 billion to Rp 100 billion or a maximum detention period of six months (Article 48(1)). Making price fixing agreements, obstructing competitors, rigging tenders, and holding dual directorships attract fines of Rp 5 billion to Rp 25 billion or up to five months' detention (Article 48(2)). For these offences, additional penalties can be applied: businesses may have their operating licence cancelled; persons involved in the prohibited activities can be banned from being a company director or commissioner for between two and five years; and injunctions can be awarded to prevent other parties suffering loss (Article 49).

Enforcement of sanctions

The Commission estimates that it has imposed fines worth Rp 2.1 trillion between 2000 and 2017, although only about Rp 303 billion of this has been recovered and paid into state coffers.[31] One explanation for this is that district courts are responsible for recovering the fines the KPPU imposes (Article 46(2)). These courts have long been criticized for providing unreliable and often unsuccessful enforcement mechanisms.[32]

Private remedies

A party who has suffered loss from Competition Law contraventions can institute civil proceedings for compensation under Article 1365 of the Civil Code (see also Article 279 of the Code of Civil Procedure). This provision is discussed in Chapter 15. There is uncertainty about how these would sit alongside any simultaneous related KPPU proceedings.

KPPU structure and staff appointment

The KPPU consists of a chair, a vice-chair, and at least seven members (Article 31(1) of the Competition Law). Commission members are appointed and dismissed by the president of Indonesia, subject to approval from the DPR (Article 31(2)). Terms last five years and each member can serve a maximum of two terms (Article 31(3)).

Commissioners must be Indonesians aged between thirty and sixty years with demonstrated loyalty to Pancasila and the 1945 Constitution. They must also be: pious, honest, fair and well-behaved; reside in Indonesia; have experience in business or knowledge and expertise in law and/or economics; have never been prosecuted for a crime; have not been declared bankrupt; and not be affiliated with a business (Article 32).

Being a commissioner is not a full-time exclusive commitment. Many continue to hold other posts, as professors or experts in law or economics, and some have also been active in national politics.

[31] M Taufikul Basari, 'Total Denda Rp 2,089 Triliun, KPPU Lemah Eksekusi' *Kabar24* (30 May 2017) <http://kabar24.bisnis.com/read/20170530/16/658149/total-denda-rp2089-triliun-kppu-lemah-eksekusi>.

[32] Simon Butt, 'The Eksekusi of the Negara Hukum: Implementing Judicial Decisions in Indonesia' in Tim Lindsey (ed), *Law and Society in Indonesia* (1st edn, Federation Press 1999).

KPPU regulations

The KPPU has produced about forty regulations and directives since 2009, all relating to either the implementation of the Competition Law or the Commission's internal administrative processes.[33]

The Commission's power to issue binding regulations has been challenged several times. In 2010, a group of lawyers challenged Regulation 1 of 2010 on Case Management, which sets out the KPPU's procedural law, before the Supreme Court. They argued that the regulation violated Law 10 of 2004 on Lawmaking, which stipulates that an institution needs statutory authorization to create procedural law. In 2011, the Supreme Court rejected the claim and upheld the regulation, identifying the source of the KPPU's regulatory power as Article 35(f) of the Competition Law, which authorizes the KPPU to issue guidelines 'in relation to' the Competition Law.[34]

In a 2012 Supreme Court case about the tendering process for a major road upgrade in South Sumatra,[35] the KPPU claimed that the Palembang district court had misunderstood the application of the Competition Law, by only examining the formal documents calling for tenders during proceedings. To support this argument, the KPPU pointed to its own Regulation 2 of 2010, which purports to interpret Article 22 of the Competition Law, and states that a collusive agreement may be written or unwritten and can cover a wide range of practices, including collusive tenders. The Supreme Court accepted that the Regulation provided a legally binding interpretation of Article 22, finding that the district court should have also considered non-documentary evidence.

Overlap with the Corruption Eradication Commission

The KPPU has examined several tender cases featuring alleged bribery. This has raised questions about the relative jurisdictions of the KPPU and the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi*, KPK, discussed in Chapter 14). To avoid overlaps and uncertainty, the two commissions have developed a Memorandum of Understanding that determines which institution will lead such cases, depending on the factual circumstances.

The Commission and the government

Some of the KPPU's biggest challenges have been from the government which, as mentioned, has long participated in, or condoned, anti-competitive business practices. According to UNCTAD:

> Most competition problems in Indonesia stem from Government actions. State-created monopolies were ubiquitous in the Suharto era and many continue to exist due to local government regulations. Many public policy makers and regulators are unfamiliar with the goals or benefits of competition policy. Moreover, they are not used to incorporating competition as a goal of their public policy.[36]

The main legal stumbling block, however, is that state-owned entities are exempt from the Competition Law if involved in producing and distributing goods and services relevant to the livelihoods of many people, and for sectors important to the national interest (Article 51).

[33] See KPPU website: <http://www.kppu.go.id/id/produk-hukum/peraturan-kppu/>.
[34] Supreme Court Decision 44/P/HUM/2010. [35] 247/K/Pdt.Sus/2012.
[36] United Nations Conference on Trade and Development (n 15) 48.

The KPPU can provide input into government policy and legal reform relevant to anti-competitive conduct (Article 35(e)). The KPPU generally decides whether and when to make recommendations to the government. The OECD has argued for more systematic processes, which would involve the KPPU in reviewing draft legislation and amendments, and better communication with the Coordinating Ministry for Economic Affairs. The KPPU has also proposed this, without success.[37] Nevertheless, the government appears to pay it some heed. In 2014, for example, the KPPU made thirteen recommendations to the government, the largest proportion of which related to the financial sector. Five of the thirteen recommendations were adopted or resulted in changes to policy.[38]

The challenges for the KPPU posed by regional governments are more acute, because their knowledge of competition policy issues is generally low. Pro-competition reform achieved at the national level is, therefore, susceptible to undermining by local legislative or executive initiatives.[39] To address this, the KPPU has established subnational branches—in Medan, Batam, Surabaya, Balikpapan, Makassar, and Manado—to help local governments develop policies and laws relevant to competition.[40] However, the difficulties of garnering subnational support for pro-competition policy and regulation are immense, particularly given the vast number of local governments and the KPPU's limited resources. In 2015, the Commission had just 320 staff member in its central and branch offices.[41] This is clearly insufficient in a nation of more than 270 million.[42]

[37] OECD (n 6) 12. [38] KPPU (n 10) 63. [39] OECD (n 6) 15.
[40] Art 3(2), Presidential Decision 75 of 1999 provided for the establishment of provincial offices 'if required'.
[41] KPPU (n 13) 36. [42] OECD (n 6) 5.

21

Media Law

INTRODUCTION

After the fall of Suharto's New Order regime, media in Indonesia experienced explosive growth. The lifting of oppressive state licensing regulations saw the number of print operators swell from just 289 during the Suharto era to more than a thousand of them several months later.[1] In 2011, the Indonesian Press Council recorded 1,081 print media and 671 online media in operation.[2] In 2013, Indonesia had twelve national private television stations, approximately nineteen pay TV providers, more than 100 local TV stations, and over 2,800 radio stations.[3]

Restrictions on media ownership exist in Indonesia but in recent years, the media has become increasingly concentrated in the hands of a few wealthy figures, including many with overt ties to political parties, as smaller operators struggle to stay afloat. The complex web of media outlets is now dominated by about eight digital conglomerates,[4] some of which are owned or controlled by senior government officeholders. The Bakrie family, for example, runs Visi Media Asia (which controls TVOne, antv, and viva.co.id). Aburizal Bakrie is a former chair of Golkar Party and, at time of writing, holds a senior position in that party. Media Group (Metro TV, Media Indonesia) is controlled by Surya Paloh, who heads the NasDem Party. Hary Tanoesoedibjo, who established his own political vehicle, Perindo, in 2015,[5] owns Global Mediacom. This captures more than a third of the TV viewing audience, with Media Nusantara Citra (MNC) TV (PT Cipta Televisi Pendidikan Indonesia, formerly known as TPI), RCTI (PT Rajawali Citra Televisi Indonesia), and Global TV (PT Global Informasi Bermutu), along with significant print and online interests.[6] Trans Corp is controlled by Chairul Tanjung, and owns TransTV and Trans7, as well as Indonesia's most visited news website, Detik.com. Although Tanjung's political affiliations are not as explicit as some of his contemporaries, he served as Coordinating Minister for the Economy for several months in 2014 under then-President Susilo Bambang Yudhoyono.

Television is the dominant form of mass media in Indonesia, with around 95 per cent of Indonesian adults watching television news at least once a week.[7] Radio has historically also been an influential medium but listenership is declining rapidly. In 2006, half of Indonesian adults said they listened to the news on the radio at least once a week. Five years later, however, that figure had fallen to 31 per cent, and it declined again to 24.1 per cent in 2012.[8] According to a 2014 Nielsen survey of the ten largest cities in Indonesia, television

[1] Ariel Heryanto and Stanley Yoseph Adi, 'Industrialization of the Media in Democratizing Indonesia' (2002) 23(2) *Contemporary Southeast Asia* 327.

[2] Dewan Pers, *Laporan Dewan Pers 2010–2013* (2013) 49.

[3] Merlyna Lim, 'The League of Thirteen: Media Concentration in Indonesia' *Participatory Media Lab, Arizona State University & The Ford Foundation* (Tempe, Arizona, 2012).

[4] Ross Tapsell, 'The Political Economy of Digital Media' in Ross Tapsell and Edwin Jurriens (eds), *Digital Indonesia: Connectivity and Divergence* (ISEAS-Yusof Ishak Institute 2017) 57.

[5] 'Hary Founds His Own Political Party' *Jakarta Post* (9 February 2015) <http://www.thejakartapost.com/news/2015/02/09/hary-founds-own-political-party.html>.

[6] Lim (n 3).

[7] Broadcasting Board of Governors (BBG) and Gallup, *Media Use in Indonesia 2012* (BBG Research Series 2012) http://www.bbg.gov/wp-content/media/2012/10/gallup-indonesia-brief.pdf.

[8] ibid.

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was the most consumed media (95 per cent of respondents), followed by the internet (33 per cent), radio (20 per cent), and newspapers (12 per cent). Radio was more important in the five cities outside Java (37 per cent) compared to Java (18 per cent).[9] Meanwhile, 79 per cent of respondents in a 2014 Indonesian Survey Institute (*Lembaga Survei Indonesia*, LSI) poll said that they got their news and information from television, while only 2 per cent said radio, and 8 per cent said the internet.[10]

Internet penetration has nevertheless grown rapidly in recent years. According to the Association of Indonesian Internet Service Providers (APJII), there were 132.7 million internet users at the end of 2016—just over one-half of the population.[11] This is almost three times the figure recorded in 2010, when APJII recorded a penetration rate of 17.6 per cent.[12] About 85 per cent of Indonesian internet users access the internet through a smartphone,[13] and about 80 per cent of Indonesian households own at least one mobile phone.[14]

Social media is very popular in Indonesia. More than 90 per cent of internet users are active on social media,[15] which is more than the United States, for example, where the figure is about 70 per cent.[16] Indonesians are among the world's biggest users of Twitter and Facebook,[17] and Jakarta has been dubbed the number one Twitter city, based on the number of tweets sent.[18]

LEGISLATIVE FRAMEWORK OF MEDIA REGULATION

Under Soeharto's New Order regime, the media was tightly controlled and highly regulated, with Press Laws enacted in 1967 and 1982, a Broadcast Law in 1997,[19] and a myriad of executive-level regulations, particularly from the Ministry of Information. These Laws required media operators to hold a printing permit (*Surat Izin Cetak*, SIC) and a publishing permit (*Surat Izin Terbit*, SIT).[20] Journalists who criticized the government or wrote on sensitive issues, like ethnicity, religion, race, and intergroup relations (*suku, agama, ras, antargolongan*, SARA), commonly faced military intimidation and threats of permit cancellation.

In 1982, the Ministry of Information passed a regulation requiring all media to also obtain a press publication enterprise permit (*Surat Izin Usaha Penerbitan Pers*, SIUPP), which could also be easily withdrawn. During the Soeharto era, more than twenty-five publishing permits were cancelled without judicial process, and several other media outlets were banned or forcibly closed, most notably *Tempo, Editor*, and *Detik* in 1994.[21] As for

[9] 'Nielsen: Konsumsi Media Lebih Tinggi di Luar Jawa' *Nielsen Press Release* (22 May 2014) <http://www.nielsen.com/id/en/press-room/2014/nielsen-konsumsi-media-lebih-tinggi-di-luar-jawa.html>.

[10] Tapsell (n 4) 58.

[11] APJII, *Penetrasi dan Perilaku Pengguna Internet Indonesia: Survei 2016* (2016) <http://www.slideshare.net/internetsehat/profil-pengguna-internet-indonesia-2014-riset-oleh-apjii-dan-puskakom-ui>.

[12] APJII, *Profil Pengguna Internet Indonesia 2014* (2015) http://www.slideshare.net/internetsehat/profil-pengguna-internet-indonesia-2014-riset-oleh-apjii-dan-puskakom-ui.

[13] ibid. [14] Broadcasting Board of Governors (BBG) and Gallup (n 7).

[15] Nicolas Picard and Michelle Chang, 'Will Indonesia's Online Youth Shape 2014 Elections?' *In Asia* (23 October 2013).

[16] Pew Research Center, *Social Networking Fact Sheet* <http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/>.

[17] Waleed Aly, 'Welcome to Jakarta, the World's Number One Twitter City' *Radio National* (29 May 2013) <http://www.abc.net.au/radionational/programs/drive/social-media-in-indonesia/4720678>.

[18] Enricko Lukman, 'Indonesia Is Social: 2.4% of World's Twitter Posts Come From Jakarta' *Tech in Asia* (13 March 2013) <https://www.techinasia.com/indonesia-social-jakarta-infographic>.

[19] Law 4 of 1967 on the Press; Law 21 of 1982 on the Press, and Law 24 of 1997 on Broadcasting.

[20] J Steele, 'The Making of the 1999 Indonesian Press Law' (2012) *Indonesia* 1, 2.

[21] Toeti Kakiailatu, 'Media in Indonesia: Forum for Political Change and Critical Assessment' (2007) 48(1) *Asia Pacific Viewpoint* 60, 63.

television, the New Order government allowed only the sole state-owned station, TVRI, to operate, until private stations were finally permitted in 1989.

The fall of Soeharto brought major changes to the media landscape in Indonesia. Under his successor, Bacharuddin Jusuf Habibie, the SIUPP regime was quickly removed.[22] During the term of the next president, Abdurrahman Wahid, Law 40 of 1999 on the Press (the Press Law) was enacted and the Ministry of Information was dissolved. After Megawati Soekarnoputri replaced Wahid, Law 32 of 2002 on Broadcasting (the Broadcasting Law) was enacted. Both the Press Law and the Broadcasting Law remain in force at time of writing.

Other important legal instruments have since been issued, including Law 11 of 2008 on Information and Electronic Transactions (the IET Law, recently amended by Law 19 of 2016), and regulations dealing with subscription services, and private, public, community, and foreign broadcasters.

The Press Law remains the only formal legal instrument specifically regulating the print media and journalists; no other subordinate government or ministerial regulations apply directly to them. The work of print media and journalists is, however, affected by many other laws, as discussed in this chapter.

Indonesian law continues to treat print and broadcast media separately, which complicates regulation for large media conglomerates with interests across multiple platforms.[23] At the time of writing, the government was preparing a Bill on media convergence (*RUU Konvergensi*), which had been listed for debate during the 2015–19 national legislative term. We discuss this later in this chapter.

In the next section, we consider the obligations these laws place on the media, the regulatory bodies established to oversee media activity, and press ownership rules. We then examine press freedom, including censorship, privacy rights, and defamation law, both criminal and civil. We conclude with an examination of freedom of information law, its use by the press, and the tensions between freedom of information and state security laws.

LEGAL OBLIGATIONS OF MEDIA

Print media

The Press Law requires the national press to perform important functions. Loftily cast, these include: fulfilling the public's right to knowledge; upholding core democratic values, promoting the supremacy of law and human rights, and respecting diversity; developing public opinion based on information that is correct, accurate, and timely; monitoring, critiquing, correcting, and offering suggestions in the public interest; and fighting for justice and truth (Article 6). Article 5(1) of the Law also requires, however, that the national press respects religious norms, public morality, and the presumption of innocence in the reports and opinions it publishes. The elucidation to Article 5(1) states that this presumption involves not passing judgement or reaching conclusions as to the guilt of a person, especially for cases that are still being tried, as well as accommodating the interests of all parties involved in a story. The press must also respect the right of reply and allows journalists to refuse to disclose their sources (Article 5(2), (3)). Article 18(2) prescribes a fine of up to Rp 500 million for violation of Article 5(1) and (2). This fine is levelled against the media company, not the individual journalist responsible for the story that violated the provisions.

[22] Yuli Ismartono, 'Challenges to Investigative Reporting in Post-Soeharto Indonesia' in Cherian George (ed), *Free Markets Free Media? Reflections on the Political Economy of the Press in Asia* (Asian Media Information and Communication Center; Nanyan Technological University 2009) 109.

[23] Ross Tapsell, 'Platform Convergence in Indonesia: Challenges and Opportunities for Media Freedom' (2015) 21(2) *Convergence: The International Journal of Research into New Media Technologies* 182.

Broadcast media

The Broadcasting Law imposes licensing and programme content obligations. For example, all broadcasts must be licensed in the sense that the broadcaster has a right to broadcast it (Article 43). Broadcasters must archive all audio recordings, video recordings, photos, and documents for at least one year after broadcast. If these have high historical, informational, or broadcast value, they must be submitted to the relevant institutions for preservation (Article 45).

Broadcasters must also correct programmes or news reports found to be misleading or erroneous, or if their content is refuted. The correction must be made at the first available opportunity, if not within twenty-four hours, although correction will not indemnify the broadcaster from further legal action by the affected party (Article 44).

OVERSIGHT OF THE MEDIA

Print: The Indonesian Press Council

Article 15(1) of the Press Law establishes the Press Council (*Dewan Pers*). This is made up of journalists, media managers, community representatives, and media experts (Article 15(3)) and its purpose is 'to foster freedom of the press and improve the national press'. To these ends, the Council is to protect the freedom of the press from intervention; establish a journalists' code of ethics and monitor compliance; help to resolve complaints or cases involving press reportage; help formulate media sector rules; improve journalist quality; and keep a database of media companies (Article 15(2)). The Council has met some of these requirements by formulating a Code of Ethics, Journalist Competency Standards, Guidelines for the Right of Reply, Guidelines for Online Reporting, Standards for the Protection of Journalists, and Guidelines for Reporting on Terrorism, among others.[24]

The Press Council is formally independent of the state and is not subject to any direct government supervision (in contrast to the Indonesian Broadcasting Commission, or KPI, discussed below).

Complaints

The Press Council receives complaints about journalistic work, behaviour, and conduct;[25] and about violence directed at journalists or media outlets,[26] but its power to act is very limited. For example, it cannot pursue complaints that have already been reported to the police or are subject to court proceedings, unless both parties withdraw from those processes (Article 4). Even then, it can only help the parties to resolve the complaint,[27] for example, through mediation or by making recommendations.[28] If mediation fails, then the Council can issue recommendations with which the parties must comply. It can also publicly disclose these recommendations and report non-compliant parties to the police.[29]

[24] See Press Council website: <http://www.dewanpers.or.id/peraturan/page>.

[25] Although the Press Council will not examine complaints about print media or broadcasts more than two months after their release, unless in the public interest: Art 3, Press Council Regulation 3/Peraturan-DP/VII/2013.

[26] Art 2, Press Council Regulation 3/Peraturan-DP/VII/2013 on Procedure for Complaints to the Press Council.

[27] Art 15(2), Press Law; Arts 11 and 12, Press Council Regulation 3/Peraturan-DP/VII/2013.

[28] Art 11, Press Council Regulation on Procedure for Complaints to the Press Council.

[29] Failure to comply with a recommendation to provide a right of response may result in criminal proceedings under Art 18(2), Press Law.

In 2016, the Press Council received 750 community complaints.[30] We note, however, that, rather than using the Council, many prominent senior government and private figures seem to prefer using criminal or civil defamation law, and actions under Law 8 of 2011 on Information and Electronic Transactions, to pursue what they perceive to be unfair or erroneous critiques of their performance. Later in this chapter, we discuss these avenues and their stifling effect on the media and, ultimately, democracy and public accountability.

In 2012, the Press Council and Indonesian National Police signed a Memorandum of Understanding (MoU) to improve coordination and protect press freedom.[31] This was intended to reduce the number of media cases handled by the police using the Criminal Code (*Kitab Undang-undang Hukum Pidana*) that could be managed by the Press Council by reference to the journalists' Code of Ethics. Several years later, however, knowledge of the MoU among police remained patchy.[32]

Similarly, although in previous years courts appeared willing to process such cases,[33] in recent years the Supreme Court has repeatedly stressed that media disputes should first be directed to the Press Council.[34]

Broadcasting oversight

The Broadcasting Law covers radio and television, and categorizes broadcasts as public, private, community, and subscriber (that is, pay-TV) (Article 13(2)), as follows.

- Public broadcasters: RRI (Radio of the Republic of Indonesia) and TVRI (Television of the Republic of Indonesia) are Indonesia's main public broadcasters. Under Soeharto, they were government mouthpieces but they have become more autonomous since his fall. This is consistent with the requirements of the Broadcasting Law, which defines public broadcasters as state-established legal entities that are independent, neutral, and non-commercial, and provide services in the public interest (Article 14(1)).[35] Public broadcasters can be established at the national and subnational levels (Article 14(2) and (3)).
- Private broadcasters: These are commercial broadcasters that operate in television or radio (Article 16(1)). Government Regulation 50 of 2005 on Private Broadcasters is the primary legal instrument regulating them. It restricts cross ownership, and requires private broadcasters to employ network-based broadcasting to protect local content.
- Community broadcasters: These are community-established, not-for-profit, independent legal entities whose broadcasts are designed to educate and promote community welfare by broadcasting cultural and educational information that depicts national identity (Article 21(2)).[36] Their transmission coverage should be limited; and

[30] 'Dewan Pers Terima Sebanyak 750 Aduan Selama 2016' *Republika* (5 January 2017) <http://nasional.republika.co.id/berita/nasional/umum/17/01/05/oja1th330-dewan-pers-terima-sebanyak-750-aduan-selama-2016>.

[31] Memorandum of Understanding Between Press Council and Indonesian National Police 01/DP/MoU/II/2012 and 05/II/2012 on Coordination in Law Enforcement and Protection of Press Freedom.

[32] Lalu Rahadian, 'MoU Dewan Pers-Polri Belum Diketahui Banyak Polisi' *CNN Indonesia* (22 December 2015) <http://www.cnnindonesia.com/nasional/20151222170711-12-99922/mou-dewan-pers-polri-belum-diketahui-banyak-polisi/>. There are, however, instances where police have stressed that disputes involving the media should first be handled by the Press Council: Martahan Sohuturon, 'Polisi Gandeng Dewan Pers Sikapi Pernyataan Eko Patrio' *CNN Indonesia* (19 December 2016) <http://www.cnnindonesia.com/nasional/20161219140533-12-180789/polisi-gandeng-dewan-pers-sikapi-pernyataan-eko-patrio>.

[33] Ellen Nakashima, 'Magazine Case Tests Indonesian Press Freedom' *Washington Post* (19 August 2004) <http://www.washingtonpost.com/wp-dyn/articles/A42646-2004Aug28.html>.

[34] Andi Saputra, 'MA Tegaskan Sengketa Pers Harus Lalui Mekanisme Dewan Pers' *Detiknews* (9 February 2017).

[35] Although their independence might be compromised by the oversight provided by the five-member supervisory board, which is appointed by the president based on recommendations from the DPR following a fit and proper test (Art 14(5)–(6)).

[36] See Government Regulation 51 of 2005.

they must not represent foreign organizations or the international community, or be associated with illegal organizations, or spread propaganda (Article 21(3)).

- Subscription broadcasters: These provide a subscription service for 'radio, television, multimedia or other forms of information', by satellite, cable, or 'terrestrial' broadcasts (Article 26(1)). They must be licensed and internally censor their broadcasts. They are required to support local content by allocating at least one channel for local content for every ten, and dedicate at least 10 per cent of their capacity to broadcasting programmes from public or private broadcasters (Article 26(2)).

The Broadcasting Commission: KPI

Article 6(4) of the Broadcasting Law establishes the Indonesian Broadcasting Commission (*Komisi Penyiaran Indonesia*, KPI). It is an independent commission, with central and provincial-level branches (Article 7(2), (3)) but its structure does not promote independence from government. In fact, the national and provincial-level legislatures directly oversee and fund it (Articles 7(4), 9(6), and 53). They also select its members after public input and a fit and proper test (Article 10(2)–(3)). These members must be 'non-partisan'—they may not, for example, be legislators, judges, or government officials. They must also have no direct or indirect relationship with the owners of media organizations (Article 10(1)(g)–(i)).

A self-described 'auxiliary state institution',[37] the KPI is responsible for ensuring broadcasters accommodate community aspirations and the public interest (Article 8(1) and (3)). It receives complaints and criticisms from the public, and aims to uphold the public's right to 'appropriate and true information'.[38] It also establishes programme standards and codes of conduct; and can issue sanctions for breach (Article 8(2)). The codes must ensure: respect for religious perspectives and privacy; civility and decency, including limiting sex, violence, or sadism; protection for women, children, and young people; age-based programme rating; and media accuracy and neutrality. They also cover live broadcasts, foreign-language content, and advertising, and must be based on 'religious and moral values' and 'other norms applied and accepted by society and broadcasters' (Article 48).

The Commission last published its Code of Conduct for Broadcasters and Program Standards (P3 & SPS) in 2012.[39] The Code is largely consistent with the provisions outlined above. It states, for example, that broadcasters must respect differences of ethnicity, religion, and race, cover diversity in culture, age, gender, or social and economic life, and must not show programmes that degrade, harass, or cause disputes between these groups.[40] The Code even states that broadcasters must pay attention to and protect the rights and interests of people who are marginalized, have certain sexual or gender identities, have physical or mental disabilities, or have certain diseases. It adds that broadcasters must not show programmes that make fun of, degrade, or insult these people or groups.[41] Similar provisions are found in the Program Standards (SPS), under Articles 6, 7, 8, 17, and 21. The KPI has typically adopted a conservative reading of its own standards. In February 2016, for example, it published a circular forbidding broadcasters from showing programmes with

[37] Komisi Penyiaran Indonesia, 'Pengawasan Penyiaran' (2007) <http://www.kpi.go.id/index.php/2012-05-03-15-54-45/pengawasan-penyiaran>.

[38] The KPI also: assists with broadcasting infrastructure regulations; helps to develop healthy competition between broadcasters and related industries; and supports the development of professional human resources in the broadcasting sector (Art 8(3)).

[39] Indonesian Broadcasting Commission (KPI), 'Code of Conduct for Broadcasters and Program Standards (P3 & SPS)' (2012) <http://www.kpi.go.id/download/regulasi/P3SPS_2012_Final.pdf>.

[40] Arts 6 and 7, Indonesian Broadcasting Commission (KPI) Code of Conduct (P3) (2012).

[41] Art 15, Indonesian Broadcasting Commission (KPI) Code of Conduct (P3) (2012).

men who acted in a feminine manner, which it saw as conflicting with Article 15(1)(b) of the Code and Articles 17(2)(b) and 21 of its Program Standards.[42]

A draft version of a new code was released in August 2015[43] but discussions stalled. The KPI subsequently said that it would wait until the Broadcasting Law was revised before it released a new code but was nevertheless planning to make minor changes in late 2016.[44] At the time of writing, these, too, had not eventuated.

Enforcement

The KPI ensures that broadcasters meet the standards it imposes and, to this end, accepts complaints about suspected code violations (Article 50(2)), which it then investigates. The KPI can issue administrative sanctions for violation, including: written admonishment; temporary suspension of a programme; limitations on broadcast scheduling; fines; a freeze on broadcasting activities; refusal of licence extension; or cancellation of broadcasting licence (Article 55(2)).[45] Broadcasters must comply with KPI decisions based on the broadcasting code of conduct.[46]

Criminal penalties of up to five years' imprisonment and up to Rp 1 billion (for radio broadcasters) or Rp 10 billion (for television) (Article 57) apply to broadcasters who broadcast programs that

> are libellous, incite [hatred], misleading or untrue; show elements of violence, obscenity, gambling, drug abuse; or cause racial, ethnic, religious or class disputes … [or] … ridicule, demean, harass or ignore religious values, the dignity of Indonesians, or damage international relations (Article 36(5)–(6)).

In June 2015, for example, the Commission ruled that TV5Monde Asie, the Asia arm of the global French-language channel, could no longer be broadcast in Indonesia because of nudity and sex scenes. In a press release, it noted that scenes of nudity in the series 'Hôtel de la Plage' violated Article 36(5)(b) of the Broadcasting Law, as well as the KPI codes of ethics and broadcasting programme standards.[47] A plenary session decided that TV5 Monde could no longer be broadcast, although no criminal sanctions were sought. One month after TV5Monde was ordered off the air, KPI held a meeting with representatives from the channel and the French Embassy, and it was decided it would be allowed to screen again. It was on air in early 2017, when this chapter was written.[48]

There is evidence that broadcasters are wary of the KPI's considerable power to issue sanctions, and have interpreted its standards strictly. This has resulted in several farcical incidents over recent years involving over-zealous use of censorship by broadcasters. In 2016, for example, CNN Indonesia was roundly condemned for blurring the torso of a female swimmer at National Sports Week (PON).[49] This followed similar controversy, where a cartoon squirrel from the show 'SpongeBob SquarePants' was blurred for wearing

[42] KPI Circular K/KPI/02/16.

[43] KPI, *Publikasi Draf Akhir P3 dan SPS 2015: Pembukaan Saran dan Masukan Publik* 2015 <http://kpi.go.id/index.php/lihat-terkini/38-dalam-negeri/32934-publikasi-draf-akhir-p3-dan-sps-2015-pembukaan-saran-dan-masukan-publik>.

[44] Anissa Margrit, 'KPI Siap Revisi Terbatas P3SPS' *Bisnis Indonesia* (28 November 2016) <http://koran.bisnis.com/read/20161128/448/606784/kpi-siap-revisi-terbatas-p3sps>.

[45] For a full list of administrative violations, see Art 55(1).

[46] Art 51(2).

[47] 'Siaran Pers: KPI Hentikan Saluran TV5 Monde Asie' *Komisi Penyiaran Indonesia* (17 June 2015) <https://www.kpi.go.id/index.php/id/lihat-terkini/38-dalam-negeri/32796-siaran-pers-kpi-hentikan-saluran-tv5-monde-asie>.

[48] Mohammad Arief Hidayat, 'KPI Izinkan TV5Monde Siaran Lagi dengan Syarat Patuhi Aturan' *Viva.co.id* (6 August 2015) <http://nasional.news.viva.co.id/news/read/658216-kpi-izinkan-tv5monde-siaran-lagi-dengan-syarat-patuhi-aturan>.

[49] 'Indonesian Swimmer Sparks Censorship Debate' *SBS News* (19 September 2016) <http://www.sbs.com.au/news/article/2016/09/19/indonesian-swimmer-sparks-censorship-debate>.

a bikini.[50] One viral incident even involved a broadcaster censoring the udders on a cow being milked.[51]

Since its inception, the KPI has received a steadily increasing number of complaints. In 2007, for example, it received 1,335 complaints about broadcast content, and in 2012 received 43,704 complaints.[52] KPI does not publish numbers of complaints received on its website with consistency, although between January–November 2015 it reportedly received 8,157 complaints and issued 250 sanctions.[53] In 2016, meanwhile, it reported receiving 5,387 complaints and issuing 175 warnings or sanctions.[54]

The KPI's power to prepare regulations affecting the broadcasting industry is a matter of some constitutional dispute. In 2004, the Constitutional Court examined the constitutionality of provisions of the Broadcasting Law. The Court struck down Article 62, which established the KPI's role in preparing government regulations on broadcasting. The Court ruled that the words 'KPI with' in the phrase 'provisions/regulations formulated by the KPI with the government' in Article 61(1) and (2) were not constitutional, as only the government has the authority to formulate regulations.[55] This left the government with sole regulatory authority over the industry.[56] The government subsequently issued a series of regulations, including Government Regulation 50 of 2005, which seemed designed to further reduce the scope of the KPI's work.[57]

MEDIA OWNERSHIP LAWS

Print

The Press Law does not prohibit concentration of ownership or shareholder influence over editorial decisions. It does, however, place limitations on foreign investment in the media. For example, foreigners may invest in local media enterprises through the stock market but may not become majority shareholders.[58]

Broadcast

By contrast, the Broadcasting Law contains provisions designed to prevent concentration of ownership. Article 18 of the Law establishes as a general principle that concentration of ownership should be limited, whether in one broadcasting area or several. It also limits cross ownership between: a private radio broadcaster and a private television broadcaster; a private broadcaster and a press enterprise; and a private broadcaster and a private broadcaster of another type, both directly and indirectly (Article 18(2)).

The Broadcasting Law requires the government to regulate the permissible number of radio and television broadcasters and the reach of their coverage (Article 18(3)). To this

[50] 'Indonesian Netizens Shocked by 'Doraemon' Censoship on TV' *Coconuts Jakarta* (1 February 2016) <https://coconuts.co/jakarta/lifestyle/indonesian-netizens-shocked-doraemon-censorship-tv/>.

[51] Corry Elyda, 'Cut! Regulators at Odds with Censors' *Jakarta Post* (28 July 2017).

[52] 'KPI Terima 43.704 Aduan Sepanjang 2012' *Komisi Penyiaran Indonesia* (29 December 2012) 4 <http://www.kpi.go.id/index.php/id/terkini/31022-kpi-terima-43-704-aduan-sepanjang-2012>.

[53] KPI, *Refleksi Akhir Tahun KPI 2015* (2015) <https://www.kpi.go.id/index.php/lihat-terkini/38-dalam-negeri/33125-refleksi-akhir-tahun-kpi-2015>.

[54] 'Bebaskan Siaran TV Dari Kekerasan' *Kompas* (2 February 2017) <https://kompas.id/baca/dikbud/2017/02/02/bebaskan-siaran-tv-dari-kekerasan/>.

[55] 'MK Pangkas Kewenangan Regulasi Komisi Penyiaran Indonesia' *Hukumonline* (28 July 2004) <http://www.hukumonline.com/berita/baca/hol10830/mk-pangkas-kewenangan-regulasi-komisi-penyiaran-indonesia>.

[56] Agus Sudibyo and Nezar Patria, 'The Television Industry in Post-Authoritarian Indonesia' (2013) 43 *Journal of Contemporary Asia* 257, 264.

[57] ARTICLE 19, *Submission on Freedom of Expression in Indonesia: Universal Periodic Review Process* (2007) 19 <https://www.article19.org/data/files/pdfs/publications/indonesia-unhrc-sub.pdf>.

[58] Art 11, Press Law and its elucidation.

end, Government Regulation 50 of 2005 limits concentration of ownership by individuals or legal entities.[59] Articles 31 and 32 of Government Regulation 50 address concentration of radio and television ownership respectively, and set out a complex list of shareholder limits based on the number of legal entities held.

Shareholder limits do not apply to private radio or television broadcasters in isolated or border areas, where 100 per cent ownership is permitted (Articles 31(2) and 32(2) of Government Regulation 50). Specified limits also do not apply to private broadcasters that had a network of stations when Regulation 50 came into effect. For them, the regulation allows ownership of 49–90 per cent of shares for the second legal entity and beyond (Article 32(3)).

According to the Regulation, individuals or single legal entities owning more than twenty radio broadcasters in Indonesia when Government Regulation 50 came into effect must divest their ownership to specified levels over a few years (Article 67).[60] Similarly, individuals or single legal entities owning 100 per cent of shares in more than two private television broadcasters must divest their shares in the third television broadcaster, and any other broadcasters (Article 68).[61]

As for cross ownership, Article 33 of Government Regulation 50 prohibits ownership of: a private radio broadcaster, a subscription broadcaster, and a print enterprise in the same region; a private television broadcaster, a subscription broadcaster, and a print enterprise in the same area; and a private radio broadcaster, a private television broadcaster, and a subscription broadcaster in the same area.

In practice, the Broadcasting Law and Government Regulation 50 have not effectively limited concentration of ownership of media companies. Media companies often use chains of share ownership and mergers and acquisitions to disguise breaches of the law and allow transfer of broadcasting licences. Media companies have used Law 40 of 2007 on Limited Liability Companies to justify the acquisition of other media companies.[62]

One of the most prominent recent cases involved the 2011 acquisition of Indosiar (PT Indosiar Visual Mandiri, through PT Indosiar Karya Media) by PT Emtek (PT Elang Mahkota Teknologi), which also owned national station SCTV (PT Surya Citra Televisi, through Surya Citra Media). The acquisition of Indosiar had been discussed since 2008 but did not proceed, reportedly over concerns about violating broadcasting regulations.[63] When plans for the acquisition of Indosiar were announced in 2011, KPI announced that the acquisition and transfer would violate Articles 18(1) and 34(4) of the Broadcasting Law and Article 32(1) of Government Regulation 50.[64] Despite this, the Ministry allowed the takeover to go ahead. The Business Competition Supervisory Commission (KPPU) later found that the acquisition did not violate Law 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Competition.[65]

[59] Yanuar Nugroho, Muhammad Fajri Siregar, and Shita Laksmi, *Mapping Media Policy in Indonesia* (2013) Centre for Innovation Policy & Governance (Indonesia); HIVOS (Organization) 41.

[60] For the twenty-first to twenty-fifth station, the individual or entity has up to four years to divest their ownership to a maximum of 20 per cent. For the twenty-sixth station and above, the individual or entity has five years to divest their ownership to 5 per cent.

[61] The individual has up to four years to reduce its ownership to a maximum of 49 per cent for the third television broadcaster; up to five years to reduce its ownership to a maximum of 20 per cent for the fourth private television broadcaster; and up to six years to reduce its ownership to a maximum of 5 per cent for the fifth and any subsequent private broadcaster.

[62] See, for example, Art 125, Law 40 of 2007; Nugroho, Siregar, and Laksmi (n 59) 52; Dian Yuliastuti, 'Sofyan Djalil: Kewenangan Batalkan Izin di Tangan KPI' *Tempo* (3 March 2006) <https://nasional.tempo.co/read/news/2006/03/03/05574762/sofyan-djalil-kewenangan-batalkan-izin-di-tangan-kpi>.

[63] 'PT EMTK Diduga Akuisisi Indosiar Gunakan Izin Bodong' *Beritasatu.com* (20 July 2011) <http://www.beritasatu.com/hukum/7769-pt-emtk-diduga-akuisisi-indosiar-gunakan-izin-bodong.html>.

[64] 'KPI Sampaikan Pandangan Hukum Akuisisi Indosiar' *Investor Daily Indonesia* (7 June 2011).

[65] KPPU, 'Akuisisi Indosiar Tidak Melanggar UU 5/1999' *kppu.go.id* (22 December 2011) <http://www.kppu.go.id/id/blog/2011/12/akuisisi-indosiar-tidak-melanggar-uu-no-51999/>.

Broadcast coverage area

The Broadcasting Law introduces a network broadcasting system (*sistem stasiun jaringan*), designed to limit the coverage of national television broadcasters and provide more room for local content. Article 6(3) establishes network and local stations, to ensure 'a balance of information between regions and between the regions and the capital'. Article 31(3) permits private broadcasters to employ a network broadcasting system with a limited coverage area.

Government Regulation 50 permits parent and network member stations (Article 34(1)), with the parent coordinating and relaying programmes to members (Article 34(2)). Private radio and television broadcasters who use these network systems must also broadcast local content (Article 34(5)). Media activists have complained that Government Regulation 50 effectively relieves major broadcasters from any obligation to implement the decentralized network-based system. According to the Regulation, parent television stations are located in provincial capitals, with members in either provincial capitals, counties, or cities; and networks should cover no more than 75 per cent of Indonesia's provinces.[66] If a television network already covered more than 75 per cent before the regulation was enacted, however, its reach can extend to 90 per cent of provinces (Article 36(f)). At least 20 per cent of the regions covered by the network system must be economically developing areas (Article 36(g)).

Foreign media involvement in broadcasting

The Broadcasting Law prohibits foreigners from establishing broadcasting institutions in Indonesia (Article 30(1)), and from managing private broadcasting institutions, unless in a solely financial or technical capacity (Article 16(2)). They may not permanently operate in Indonesia but they can open an office in, and send correspondents to, Indonesia, with a licence from the minister.[67]

Article 17(2) of the Broadcasting Law permits foreigners to invest in private broadcasters to a maximum of 20 per cent of the total capital of the broadcasting entity, provided that there are at least two shareholders (though the Law does not specify what nationality these shareholders must be). The 20 per cent limit is repeated in the 'negative list' of fields open and closed to foreign investment.[68]

Concentration of media ownership

As discussed, the laws designed to prevent media ownership concentration have been largely ineffective. Indeed, since the Broadcasting Law's enactment, there has been a trend towards greater concentration, with ownership dominated by less than a dozen media groups. These groups—and their powerful owners, most of whom are politically aligned—exert significant influence, about which much concern is now being expressed.

Two groups dominate the print sector: the Kompas Gramedia Group and the Jawa Pos Group. Kompas Gramedia Group owns Indonesia's most widely read and respected daily newspaper, *Kompas*, which was established in 1965, and in 2015 claimed a circulation of about 530,000 copies daily.[69] Kompas Gramedia Group is affiliated with the

[66] Art 36(a), (b), (e), Government Regulation 50 of 2005.

[67] Arts 3 and 5(1), Government Regulation 49 of 2005 on Broadcast Guidance for Foreign Broadcasting Institutions.

[68] As discussed in Chapter 18, this takes the form of a presidential regulation implementing Law 25 of 2007 on Investment, which is updated from time to time.

[69] See <http://www.kompas.com>. The true circulation of *Kompas* is uncertain: Nugroho, Siregar, and Laksmi (n 59) 101.

largest English-language newspaper, *The Jakarta Post*, and owns more than twenty regional papers under the *Tribun* banner.[70] It recently established a television channel, *Kompas TV*.

The Jawa Pos Group has an even stronger regional focus. It owns the country's second most-read paper, *Jawa Pos*, which at one point had a circulation of about 400,000 copies daily.[71] It also has more than 140 regional newspapers, many under the *Radar* group, a subsidiary of the Jawa Pos Group.[72] The owner of the Jawa Pos Group, Dahlan Iskan, was Minister for State-Owned Enterprises under President Yudhoyono.

At the time of writing, five media groups controlled Indonesia's ten national private television stations. According to an AC Nielsen ratings survey from January 2017,[73] MNC Group captured more than 40 per cent of the television audience, with RCTI, Global TV (PT Global Informasi Bermutu), and MNC TV (PT Cipta Televisi Pendidikan Indonesia, formerly known as TPI).[74] MNC Group also has interests in print (*Koran Sindo*) and online media (okezone.com, sindonews.com). The second largest group, EMTEK (PT Elang Mahkota Teknologi), controlled about one-quarter of the broadcast share, through ownership of SCTV (PT Surya Citra Televisi) and Indosiar (PT Indosiar Visual Mandiri). EMTEK is owned by Eddy Kusnadi Sariaatmadja, one of Indonesia's richest businessmen, who has a reputation for avoiding politics.[75] The next largest groups include Visi Media Asia (antv and tvOne), Trans Corp (which owns TransTV and Trans7), and Media Group (Metro TV).[76] TVRI, the state-owned public broadcaster, has generally struggled to attract above 1 per cent of the market.[77]

Concern about the concentration of media ownership and the political affiliations of media group owners is growing in Indonesia, and was brought into sharp relief during the 2014 presidential election campaign and as votes were being counted. Leading up to the presidential election on 9 July 2014, TV reporting was highly partisan, with Surya Paloh's MetroTV clearly backing Joko Widodo, and Aburizal Bakrie's TVOne and Hary Tanoesodibjo's RCTI and MNC supporting Prabowo Subianto.[78] On election day, TVOne, ANTV, RCTI, MNC, and Global TV broadcast quick count results suggesting a Prabowo victory, while MetroTV—which only captured 6.9 per cent of the audience that night—broadcast quick counts suggesting a Jokowi win.[79] Indonesian viewers were understandably confused, with both sides declaring victory on different channels.[80]

[70] *Tribun* website: <http://www.tribunnews.com>.

[71] See *Jawa Pos* website: <http://www.jawapos.co.id>.

[72] Tapsell (n 23) 187. In January 2015, the Jawa Pos National Network included 195 publications, covering daily newspapers, tabloids and magazines: <http://www.jpnn.com>.

[73] Wataru Suzuki, 'Company in Focus: Indonesian Media Giant Faces Challenges to Its Cash-Cow Soaps' *Nikkei Asian Review* (2 March 2017) <http://asia.nikkei.com/magazine/20170302/Business/Global-Mediacoms-TV-arm-faces-Indonesian-soap-opera-war>.

[74] The Nielsen surveys only include data from households in Indonesia's ten largest cities, with about 58 per cent coming from the largest city, Jakarta: Ross Tapsell, 'Indonesia's Media Oligarchy and the 'Jokowi Phenomenon'' (2015) 99 *Indonesia* 29, 34.

[75] Suzuki (n 73).

[76] According to the January 2017 survey, ANTV and TVOne captured 18 per cent of the audience; and TransTV and Trans7 13 per cent: ibid.

[77] Lim (n 3) 4.

[78] Febrian, 'Dewan Pers: Metro TV Versus 'Keroyokan' TV One dan MNC Group' *Kompas* (18 June 2014) <http://nasional.kompas.com/read/2014/06/18/1556355/Dewan.Pers.Metro.TV.Versus.Keroyokan.TV.One.dan.MNC.Group>.

[79] 'TvOne dan MNC Tampilkan Quick Count Berbeda, Sahamnya Anjlok' *Detikfinance* (10 July 2014) <https://finance.detik.com//d-2633398/tvone-dan-mnc-tampilkan-quick-count-berbeda-sahamnya-anjlok>; Tapsell (n 74) 48.

[80] Kanupriya Kapoor and Eveline Danubrata, 'Both Candidates in Indonesia Election Claim Victory; Jokowi Ahead in More Counts' *Reuters* (9 July 2014) <http://www.reuters.com/article/us-indonesia-election-idUSKBN0FD2KZ20140709>.

Convergence

Closely related to media ownership is the issue of convergence, where Indonesia's major media players adapt and merge media from all platforms into a single newsroom.[81] This practice has raised questions about the appropriateness of regulating different types of media separately. As the lines between media platforms blur, so too do choices about which regulator (the Indonesian Broadcasting Commission (KPI), the Press Council, or another body altogether) should be responsible, particularly for overseeing online content.[82] As mentioned, the Ministry of Communications and Information was preparing a Bill on media convergence (*RUU Konvergensi Telematika*) at the time of writing. It remains on the long list of priority bills for deliberation in the DPR between 2015 and 2019.

FREEDOM OF THE PRESS

Article 28F of the 1945 Constitution provides that:

> Every person shall have the right to communicate and to obtain information for the purpose of the development of his or her self and social environment, as well as the right to seek, obtain, possess, store, process and convey information by using all available channels.

This appears to provide citizens with freedom of speech or expression, and the press with freedom to convey seek, store, and then convey information. Freedom of expression is also provided by the International Covenant on Civil and Political Rights, which Indonesian ratified in 2005.[83]

The Press Law guarantees press freedom in Indonesia as a human right of all citizens (Article 4(1)), and states that 'to safeguard freedom of the press, national media have the right to search for, obtain and disseminate ideas and information' (Article 4(3)). In stark contrast to Soeharto-era regulations, the Law explicitly provides that the media is not subject to censorship, gagging, or broadcasting prohibitions (Article 4(2)). The elucidation to Article 4 extends this freedom to print and electronic media but notes that broadcasts that are non-journalistic in nature are subject to the relevant legislation.

Article 4 of the Law also grants journalists the so-called 'reporter's privilege': the right to keep sources confidential. According to Article 4's elucidation, this right applies when a journalist is questioned by a police officer or prosecutor, or is called as a witness in court. However, the reporter's privilege is limited: if a court thinks that disclosure is in the interests of national safety or public order, the reporter can be compelled to disclose his or her source. The consequences of a reporter defying a court order to disclose are unclear.

Article 18(1) imposes criminal penalties—up to two years' imprisonment or a fine of up to Rp 500 million—on any person who intentionally obstructs press freedom as described in Article 4(2) and (3). Unfortunately, there have been numerous reports of journalists being threatened or harmed, either to discourage them from reporting something, or in retribution for information already reported.[84] A recent example was the case of Zudhy Febrianto,

[81] Tapsell (n 23).

[82] 'RUU Konvergensi Media Cegah Monopoli Media' *Viva.co.id* (20 July 2010) <http://nasional.news.viva.co.id/news/read/165845-ruu-konvergensi-media-cegah-monopoli-media>.

[83] Law 12 of 2005 on the Ratification of the International Covenant on Civil and Political Rights. We note, however, that, the domestic legal effect of the ratification by Indonesia of an international treaty is not specified in Indonesian law and is, therefore, unclear: Simon Butt, 'The Position of International Law within the Indonesian Legal System' (2014) 28(1) *Emory International Law Review 1*.

[84] For example, three marines who assaulted several journalists in May 2012 were imprisoned for terms ranging between eight and eleven months. Andri El Faruqi, 'Tiga Marinir Terbukti Menganiaya Wartawan' *Koran Tempo* (5 April 2013) <https://koran.tempo.co/konten/2013/04/05/305944/Tiga-Marinir-Terbukti-Menganiaya-Wartawan>. The judgment is not available so it is unclear to what extent the court relied on the Criminal Code, the Press Law, or both.

who was assaulted by police when reporting a police arrest at a meeting of the Indonesian Muslim Students Association (HMI) in Pekanbaru, Riau.[85]

Freedom to establish media enterprises

Article 9(1) and (2) of the Press Law grants Indonesian citizens the right to form press enterprises, which must be legal entities. The Broadcasting Law requires operators to obtain a license before broadcasting.[86] Although this Law mandated the establishment of an independent KPI with the power to license broadcasters, its role in licensing was wound back significantly by Government Regulation 50. Now, the Minister of Communications and Information Technology issues these licences, on the KPI's recommendation.[87] Broadcasting without a licence is a criminal offence, attracting up to two years in prison and fines of Rp 500 million (for radio broadcasters) and Rp 5 billion (for television). Article 30 of the Law prohibits foreign ownership, as discussed below.

According to the 2002 Broadcasting Law, television permits are valid for ten years and radio permits for five years.[88] Once these periods have lapsed the licences may be renewed for another ten years for television and five years for radio.[89] Trading and transfers of licences are prohibited,[90] although, as discussed above, media companies often trade shares to circumvent these restrictions.

Professional associations

The New Order regime recognized only one professional organization, the Indonesian Journalists Association (*Persatuan Wartawan Indonesia*, PWI), whose board it filled with government sympathizers.[91] Membership was compulsory for all Indonesian journalists. A rival, the Independent Journalists Alliance (*Aliansi Jurnalis Independen*, AJI), was established in 1994, after the Soeharto government cancelled the publishing permits of *Detik, Editor*, and *Tempo* for criticizing the regime. The government refused to acknowledge AJI, and put intense pressure on it to disband, but it endured.[92] The Press Law now allows journalists to choose an association.[93] Today, dozens of professional organizations exist across Indonesia but the Press Council recognizes only three: PWI, AJI, and the Association of Indonesian Television Journalists (*Ikatan Jurnalis Televisi Indonesia*, IJTI).

Even though PWI is no longer the sole compulsory journalist association, it remains the largest, with about 14,000 members. AJI has only about 2,000 members but is a strong voice in advocating for freedom of the press and democratic values.[94]

[85] 'Polresta Pekanbaru Minta Maaf Atas Pengeroyokan Wartawan: Okezone News' *Okezone news* (5 December 2015) <http://news.okezone.com/read/2015/12/05/340/1261587/polresta-pekanbaru-minta-maaf-atas-pengeroyokan-wartawan>. For more examples, see Arfi Bambani Amri and Abdul Manan, *Arus Balik Demokrasi: Keberagaman Diberangus, Kebebasan Ditindas, Laporan Tahunan AJI* (Aliansi Jurnalis Independen (AJI) Indonesia 2016).

[86] Art 33, Broadcasting Law.

[87] Art 5(6) and (10), Government Regulation 50 of 2005.

[88] Art 34(1), 2002 Broadcasting Law.

[89] Art 9(2), Government Regulation 50 of 2005.

[90] Art 34(4), 2002 Broadcasting Law.

[91] Kakiailatu (n 21) 63.

[92] David Hill, 'Aliansi Jurnalis Independen (Alliance of Independent Journalists)' in Derek Jones (ed), *Censorship: A World Encyclopaedia* (Routledge 2011).

[93] Art 7(1), Press Law.

[94] RH Priyambodo, 'Margiono Terpilih Aklamasi Kembali Pimpin PWI' *Antara News* (19 September 2013) <http://www.antaranews.com/berita/396467/margiono-terpilih-aklamasi-kembali-pimpin-pwi>; Maida El Muhta, *Journalists' Professional Organizations and Human Rights Education in North Sumatra* (Human Rights Education Information Centre 2016) 106; Eko Widianto, 'Jurnalis Butuh RUU Pekerja Pers' *Tempo* (8 December 2013) <https://nasional.tempo.co/read/news/2013/12/08/078535565/jurnalis-butuh-ruu-pekerja-pers>.

Professional ethics

The Press Law requires that journalists have a professional ethics code and comply with it. Many of the new journalists' associations that emerged after Soeharto produced their own code of ethics. By 2006, it was clear that the industry needed a single code, and twenty-nine journalist and media organizations came together with the Press Council to draft one. Adopted in 2008 by Press Council Regulation,[95] the Code states that the Indonesian journalist:

1. is independent and produces reports that are accurate, balanced, and without malice;
2. is professional in the completion of journalistic assignments;
3. always verifies information, reports in a balanced way, does not mix facts with biased opinion and upholds the presumption of innocence;
4. refrains from producing reports that are false, libellous, sadistic, or obscene;
5. does not publish or broadcast the identity of victims of sexual crimes or minors who have committed crimes;
6. does not misuse his/her profession and accepts no bribes;
7. has the right of refusal to protect sources who are not willing to reveal their identity or location, respects the conditions of an embargo, background information, and 'off the record' information as agreed;
8. does not publish or broadcast reports based on prejudice or discrimination of anyone based on difference in ethnicity, race, skin colour, religion, gender, or language, and does not degrade the dignity of the weak, ill, and those with mental or physical disability;
9. respects the right of sources to privacy, except in matters of public interest;
10. immediately retracts, rectifies, and corrects errors or inaccuracies in reports, and apologizes to readers, listeners, or viewers; and
11. provides the right to reply and the right of correction in a proportional manner.

The Press Council is required to examine alleged violations of the Code, and to issue findings about those violations. It adopted procedures for receiving journalistic complaints in July 2013,[96] as discussed above.

Article 42 of the Broadcasting Law requires broadcast journalists to comply with an ethics code, which, at time of writing was the Code of Conduct for Broadcasters (P3) and Broadcasting Program Standards (SPS) (2012).

Protection of journalists

The Press Law grants journalists 'legal protection' when performing their professional duties (Article 8). The elucidation to this provision explains that 'legal protection' means a 'guarantee of government or society protection' for journalists in the exercise of their functions, rights, responsibilities, and roles in accordance with applicable laws and regulations. Organizations such as AJI have expressed concern that the legal protections in the Press Law are not sufficiently detailed to protect journalists from legal action such as defamation charges.[97] In 2008, the Press Council issued Regulation 5/Peraturan-DP/IV/2008,

[95] Press Council Regulation 6/Peraturan-DP/V/2008 on the Ratification of Press Council Regulation 03/SK-DP/III/2006 on the Journalists' Code of Ethics as a Press Council Regulation.

[96] Press Council Regulation 3/Peraturan-DP/VII/2013 on Press Council Complaint Procedures.

[97] Human Rights Watch, *Turning Critics into Criminals: The Human Rights Consequences of Criminal Defamation Law in Indonesia* (New York: Human Rights Watch 2010) 36.

which seeks to impose requirements for protection of journalists.[98] These include standards for legal protection, protection from violence and the seizure or destruction of property, protection of journalists in conflict zones, and protection from censorship. The regulation also states that journalists cannot be forced to produce news reports that violate the Journalistic Code of Ethics.

Press freedom and the Law on the Management of Social Conflict

None of the main media statutes specifically regulate the role of the media and journalists in conflict zones in Indonesia. Article 8 of the Press Law mentions that, in performing their duties, journalists shall receive legal protection, which should, in theory, extend to situations of conflict. Other regulations, however, have the potential to limit journalists' ability to report from conflict zones—in particular, Law 7 of 2012 on the Management of Social Conflict.

Articles 26, 27, and 28 of this Law provide absolute authority to the president, governor or relevant city/county head, to restrict the rights of any persons to enter or leave a conflict zone. Article 1(1) defines 'social conflict' as 'conflict or physical confrontation between two or more community groups that has a wide impact, causing insecurity and social disintegration to the extent that it interferes with national stability and development'.

Civil society organizations have expressed concern about the potential for these provisions to restrict press freedom in Indonesia. The Southeast Asian Press Alliance said, for example, that the Law 'could be seen as a deliberate attempt to cover any wrongdoings or abuses by the authorities'.[99]

Challenges to press freedom

Indonesia's media has been described as 'among the most vibrant and open in the region'[100] but despite the advances of the democratic era, several significant obstacles to press freedom remain. Freedom House therefore considers Indonesia's press only 'partly free'.[101] Reporters Without Borders, meanwhile, ranked Indonesia just 130th out of 180 countries surveyed in 2016.[102] This represents a significant fall since its high of 57 out of 134 countries, achieved in 2002 after the sweeping reforms of the first five years after Soeharto.[103]

In its annual reports on Indonesia, Freedom House examines legal, political, and economic impediments to press freedom. One legal impediment identified in its most recent report was the Blasphemy Law.[104] Freedom House pointed to the December 2014 case involving the then *Jakarta Post* editor in chief, Meidyatama Suryodiningrat, who was named a suspect for publishing a cartoon about the so-called Islamic State group that conservative

[98] Press Council Regulation 5/Peraturan-DP/IV/2008.

[99] 'Increasing Restrictions and Violence in the Media' *Southeast Asian Press Alliance* (2 May 2013) <https://www.seapa.org/increasing-restrictions-and-violence-in-the-indonesian-media/>.

[100] Freedom House, 'Indonesia', *Freedom of the Press 2014* (Freedom House 2014) <https://freedomhouse.org/report/freedom-press/2014/indonesia>.

[101] Freedom House, 'Indonesia', *Freedom of the Press 2016* (Freedom House 2016) <https://freedomhouse.org/report/freedom-press/2016/indones>.

[102] Reporters Without Borders, 'Indonesia', *2016 World Press Freedom Index* (Reporters Without Borders 2016) <https://rsf.org/en/indonesia>.

[103] ibid; Tapsell (n 23).

[104] Presidential Instruction 1/1965 on the Prevention of Abuse or Blasphemy of Religion inserted Article 156a into the Criminal Code. This restricts people from expressing views on religion that deviate from the conventional understandings of the six officially recognized religions. Punishments include imprisonment for up to five years. See Tim Lindsey, *Islam Law and Society in Southeast Asia, Vol. I: Indonesia* (IB Tauris, 2012) 52–53, 429–30.

groups deemed offensive.[105] Although police have not pursued charges against him, he was still formally a suspect at time of writing, meaning that authorities could detain and prosecute him at any time. Freedom House likewise expressed concern over the Criminal Code's numerous defamation provisions, and the apparent preference of some powerful figures to use them in response to negative media reports, rather than first attempting resolution through the Press Council.[106] We return to defamation later in this chapter.

Journalists also report attacks and physical harassment from both state authorities and non-state actors. Although no deaths have been recorded since 2010, AJI recorded forty-four cases of violence against journalists in 2015, an increase on the forty cases recorded in 2014 but less than the fifty-six cases in 2012.[107] Reporting on environmental destruction, in particular, can be high risk, with plantation and mining companies (or the security staff employed by them) often accused of threatening or attacking journalists. In 2010, for example, Ardiansyah Matra'is, a reporter for Merauke TV in Papua, died suspiciously after receiving threatening text messages about his coverage of illegal logging.[108] Also in 2010, the body of Alfred Mirulewan, a journalist from *Pelangi* weekly magazine, in Maluku, was found on a beach on Kisar Island, southwest of Ambon, near Timor Leste. Mirulewan had been investigating unlawful fuel sales in the isolated region.[109] AJI repeatedly calls on the government and police to investigate or reinvestigate the deaths of journalists, including those of Matra'is and Mirulewan,[110] but to no avail.

RESTRICTIONS ON MEDIA CONTENT

Print

The Press Law provides that media organizations must not run advertisements that:

- denigrate religion, disturb harmonious interreligious relations, or contravene the community's sense of morality;
- display alcohol, narcotics, psychotropic substances, or other addictive chemicals; or
- display smoking or the use of cigarettes (Article 13).

Media companies violating these prohibitions face maximum fines of Rp 500 million (Article 18(2)).

Broadcast

The Broadcasting Law is more restrictive, extending to both advertising and programme content. Formally, content must comply with the 'principles, aims, functions and ideals' of broadcasting, specified in the Law.[111] At their most innocuous, these are lofty platitudes not reflected in practice in the broadcasting industry. Article 2, for example, states that broadcasting is implemented based on the national ideology, Pancasila, and the 1945 Indonesian

[105] 'Indonesian News Editor Accused of Blasphemy over Isis Cartoon' *The Guardian* (12 December 2014) <https://www.theguardian.com/world/2014/dec/12/indonesian-news-editor-accused-blasphemy-isis-cartoon>.

[106] Freedom House, 'Indonesia' (n 101).

[107] Amri and Manan (n 85).

[108] 'How Was Investigative Reporter Pushed to Kill Himself?' *Reporters* Without Borders (6 August 2010) <https://rsf.org/en/news/how-was-investigative-reporter-pushed-kill-himself>; Arfi Bambani Amri, 'Benarkah Jurnalis Ardiansyah Dibunuh?' *Viva.co.id* (21 September 2010) <http://nasional.news.viva.co.id/news/read/178781-autopsi-polri--jurnalis-ardiansyah-dibunuh>.

[109] 'Tersangka Pembunuh Mirulewan Hanya Pion' *Antara* (28 January 2011) <http://www.antaramaluku.com/berita/12412/mmc--tersangka-pembunuh-mirulewan-hanya-pion>.

[110] Suwarjono and Arfi Bambani Amri, 'AJI Urges Jokowi to Protect Press Freedom' *Press Release* (Alliance of Independent Journalists 2014).

[111] Arts 2, 3, 4, 5, and 55 of the Law.

Constitution, and must be based on principles of utility, fairness and equity, legal certainty, security, diversity, partnership, ethics, independence, and freedom and responsibility. Because they focus on what broadcasts should contain, rather than what they must not, these ideals are difficult, if not impossible, to apply objectively to broadcasts. We fear that if Indonesia were in the future to be once again ruled by a repressive government, these principles could easily be subjectively applied to ban content unfavourable to the state.

More concrete are requirements that broadcasts provide at least 60 per cent local content (Article 36(2)). They must also employ Indonesian as the main language, unless subnational dialects would be appropriate (Articles 37 and 38(1)). Foreign language programmes are permissible but Indonesian subtitles must be displayed, or the content dubbed in Indonesian language (but only for a maximum of 30 per cent of the foreign programmes shown) (Article 39(1)–(2)).

The Law forbids content that: is slanderous, seditious, misleading, or deceptive; highlights violence, obscenities, gambling, narcotics, and other prohibited substance abuse (Article 36(5)); incites ethnic, religious, race, or inter-communal conflict; demeans, denigrates, or ignores religious values and human dignity; or damages international relations (Article 36(6)). Violation of these articles can result in imprisonment for up to five years and a fine of Rp 1 billion for radio broadcasts and Rp 10 billion for television. The broad nature of these prohibitions and the heavy penalties they attract have been criticized by media activists and commentators for going far beyond international norms.[112]

Broadcasting Program Standards Restrictions

The KPI's Broadcasting Program Standards (SPS), issued by way of KPI Regulation 02/P/KPI/03/2012 on Broadcasting Code of Conduct (P3) and Program Standards (SPS), also impose more detailed restrictions, particularly concerning religious and sexual content.[113] Religious content must: respect ethical interreligious relations and cannot attack, insult, or abuse the views and beliefs of a particular religion; provide content on differences of opinion or understanding in a particular religion in a careful, balanced, impartial manner, with competent and responsible sources or speakers; not present differences between religions; and not offer reasons for an individual or group to change religion (Article 7 of the SPS).

As for sexuality, the SPS contains a long list of prohibitions, including broadcasting: nudity; sexual scenes; voices or sounds depicting sexual activity; sexual violence; discussions about sexual activities; scenes of, or the sound of, sex between animals in a 'vulgar' manner; kissing; close-up or medium shots of thighs, buttocks, or breasts; erotic body movements or dancing; the impression of nudity; the impression of kissing; and lewd or obscene words (Article 18). The standards also prohibit programmes that endorse sex outside marriage; abortion as an appropriate action following sex outside marriage; or rape as anything but a serious crime (Article 19).

A broadcast may, however, discuss sexuality if presented politely and scientifically, accompanied by a health practitioner or psychologist, and shown between the hours of 22:00 and 03:00 (Article 22). There are also exceptions for broadcasts discussing adolescent sexual health education, sexual orientation, and gender identity, which must be presented 'in accordance with the development of the young person, politely, carefully and scientifically, and accompanied by a health practitioner or psychologist' (Article 22).

[112] Freedom House, *License to Censor: The Use of Media Regulation to Restrict Press Freedom—Indonesia* (Freedom House 2011) <http://www.refworld.org/docid/4eccefc6c.html>.

[113] Indonesian Broadcasting Commission Regulation 02/P/KPI/03/2012 on Broadcast Program Standards, Chapters IV, XII.

Broadcaster advertising restrictions

The Broadcasting Law establishes similar standards for broadcast advertisements, which must not:

- promote particular religions, ideologies, individuals, or groups so as to offend or denigrate the dignity of other religions, ideologies, individuals, or groups;
- promote alcohol or similar substances or addictive chemicals;
- promote smoking by showing cigarettes;
- promote issues that conflict with public morality and religious values; and/or
- exploit children under eighteen years.[114]

Private broadcasters can allocate no more than 20 per cent of broadcast time to advertisements, and public broadcasters no more than 15 per cent (Article 46(8)). Of this advertisement time, private broadcasters must allocate at least 10 per cent for community or public service announcements; and public broadcasters at least 30 per cent. All advertising content must be locally produced (Article 46(11)).

Other regulatory restrictions

Law 44 of 2008 on Pornography also affects what the media can cover. Pornography and its regulation in the media has long been contentious in Indonesia but since the fall of Soeharto the country has witnessed growing efforts to control public morality and a more explicit connection between morality and religious values.[115] The first few years after the collapse of the New Order saw growing public concern about an explosion in the distribution of pornographic VCDs, as well as the publication of sexual content in the mainstream media.[116] The conservative Indonesian Ulama Council (*Majelis Ulama Indonesia*, MUI) played a significant role in the drafting of the Pornography Law. In 2001, it issued a fatwa on pornography and 'porno-action' (sexually arousing body movements) and compiled a highly controversial draft version of an early Bill on these issues, which was debated for several years before being passed in 2008. Although numerous revisions were made over this period, the final Law was significantly influenced by the MUI position.[117]

Article 1(1) of the Law defines pornography as:

> pictures, sketches, illustrations, photos, writing, voices, sounds, moving pictures, animations, cartoons, conversations, body movements, other forms of messages via communications media and/or performances in public that contain indecency or sexual exploitation that violates moral norms in society.

It prohibits individuals from:

> producing, creating, multiplying, duplicating, distributing, broadcasting, importing, exporting, offering, trading, renting out, or providing pornography that contains: sexual intercourse, including deviant sexual behaviour [defined in the elucidation to Article 4(1) as sexual

[114] The KPI has issued specific regulations for advertising, including regulations in relation to children, in its Broadcast Guidelines (P3) and Broadcasting Program Standards (SPS).

[115] Jennifer Lindsay, 'Media and Morality: Pornography Post Suharto' in David Hill and Krishna Sen (eds), *Politics and the Media in Twenty-First Century Indonesia* (Routledge 2012) 175.

[116] Thomas Barker, 'Sex on Indonesia's Screens' in Linda Rae Bennett and Sharyn Graham Davies (eds), *Sex and Sexualities in Contemporary Indonesia* (Routledge 2015) 265.

[117] Moch Nur Ichwan and Martin van Bruinessen, 'The Majelis Ulama Indonesia and Politics of Religious Orthodoxy' in Martin van Bruinessen (ed), *Contemporary Developments in Indonesian Islam: Explaining the 'Conservative Turn'* (ISEAS 2013) 60.

activity with corpses, animals, oral sex, anal sex, and lesbian and homosexual sex]; sexual violence; masturbation; nudity or the appearance of nudity; genitals; or child pornography.[118]

The broad definition of pornography, and the potential for very conservative interpretation of 'moral norms', has concerned media activists.[119] The Association of Independent Journalists, for example, repeatedly refers to the Law as one of the main threats to media freedom.[120] The Ministry of Media and Communications has used the Law to justify banning thousands of websites, many with little connection to pornography, such as the video-sharing site Vimeo.[121]

Law 11 of 2008 on Information and Electronic Transactions (the IET Law, recently amended by Law), 19 of 2016 also restricts media freedoms. Article 28(2) prohibits 'intentional dissemination of information intended to create hatred or division between individuals or groups in society based on ethnicity, religion, race and social groupings'. Violation of this provision can attract up to six years' imprisonment and/or a fine of up to Rp 1 billion (Article 45A(2)). Again, this is an offence of very broad scope that seems highly susceptible to subjective interpretation. In 2012, thirty-two-year-old Alexander Aan was convicted under this Law and sentenced to two and a half years' imprisonment after several postings on Facebook expressing his atheist beliefs and making statements about Islam and the Prophet Muhammad that were considered offensive.[122] In late 2015, the Islamic Defenders Front (FPI) reported Ahmad Fauzi, author of the book *Tragedi Incest Adam dan Hawa dan Nabi Kriminal* (*The Tragedy of the Incest of Adam and Eve and the Criminal Prophet*), to Central Java Police over a series of Facebook and Twitter posts promoting his book. At the time of writing, police were investigating Fauzi for violating Article 28(2) of the IET Law.[123]

Also in 2012, Sebastian Joe, of Ciamis, West Java, was reported to police by the Islamic Defenders Front (FPI) for a series of Facebook posts that they believed insulted Islam. The Ciamis District Court sentenced him to four years in prison for blasphemy, under Article 156a of the Criminal Code.[124] On appeal, the Bandung High Court sentenced him to five years in prison under Article 28(2) of the IET Law.[125] The Supreme Court rejected a cassation appeal in April 2013, leaving the Bandung High Court decision standing.

Censorship

The Press and Broadcasting Laws, various human rights instruments and Law 14 of 2008 on Freedom of Information (discussed below), all introduced in the post-Soeharto period, have brought new freedoms, at least on paper. However, the government has not yet fully embraced them. One example is the retention of the Film Censorship Board (*Lembaga Sensor Film*, LSF), established under Dutch rule and very active in the Soeharto era. The Board continues to take a cautious and, at times, repressive approach, to media content.

[118] Art 4(1), Law 44 of 2008 on Pornography. For a discussion of the development of the Bill, the debate surrounding it, and the final content of the Law as passed, see Lindsey (n 105) 445–81.

[119] Helen Pausacker, 'Sanctions against Popstars … and Politicians? Indonesia's 2008 Pornography Law and Its Aftermath' in B Platzdasch and J Saravanamuttu (eds), *Religious Diversity in Muslim-majority States in Southeast Asia: Areas of Toleration and Conflict* (ISEAS-Yusof Ishak Institute 2014).

[120] AJI, *Catatan Akhir Tahun AJI: Kekerasan Terhadap Jurnalis Meningkat Tajam* (2016) <https://aji.or.id/read/berita/593/catatan-akhir-tahun-aji-kekerasan-terhadap-jurnalis-meningkat-tajam.html>.

[121] In a press release explaining the ban of Vimeo, the Ministry of Communications and Information refers directly to Arts 4, 17, and 18, Pornography Law: Penanganan Vimeo.com', *Press Release* 30 /PIH/Kominfo/5/2014, Kementerian Komunikasi dan Informatika RI (12 May 2014) <https://kominfo.go.id:443/index.php/content/detail/3984/Siaran-Pers-No.-30--PIH-Kominfo-5-2014-tentang--PENANGANAN-VIMEO.COM-/0/siaran_pers>.

[122] Decision 45/PID.B/2012/PN.MR.

[123] Rofiuddin, 'Diduga Nistakan Agama, Alumni UIN Semarang Diperiksa Polisi' *Tempo* (29 December 2015) <https://nasional.tempo.co/read/news/2015/12/29/078731504/diduga-nistakan-agama-alumni-uin-semarang-diperiksa-polisi>.

[124] Ciamis District Court Decision 278/Pid.Sus/2012/PN.Cms.

[125] Bandung High Court Decision 463 Pid/2012 / PT.Bdg.

Article 47 of the Broadcasting Law requires all films and advertisements shown on Indonesian television to be approved by censors before broadcast. Film censorship is further regulated by Law 33 of 2009 on Film (Articles 57–66) and Government Regulation 7 of 1994 on the Film Censorship Board. Article 18 of the Regulation, in particular, specifies religious, ideological, social, cultural, and 'public order' issues that the Board must examine.

The LSF is notoriously conservative. It has banned films that portray the Indonesian state in a bad light, or contain 'sensitive' religious elements. In 2010, for example, it prohibited the Australian film, *Balibo*, which depicted the murder of five Australian journalists at the hands of the Indonesian army in East Timor in 1975.[126] In 2014, it banned the Hollywood epic *Noah*, for 'contradicting' the Qur'an.[127] However, even films approved by the Board have not screened when protests have been made by religious organizations. For example, the Islamic Defender's Front (FPI) organised large protests to pressure Bandung cinemas to stop screening Hanung Bramantyo's film, *?* (sometimes called *Tanda Tanya* or 'Question Mark'), even though the Board had approved it.[128] Protesters apparently objected to its central theme of pluralism, and the fact that one of the characters converted from Islam to Catholicism.[129] Similarly, SCTV cancelled plans to screen the film on television after the FPI held demonstrations outside its Jakarta offices.[130]

Until 2010, the Attorney General's Office could ban books under Presidential Decision 4 of 1963 on the Security of Printed Materials that May Disturb Public Order.[131] In 2010, the Constitutional Court removed that power.[132] The Court acknowledged the state's powers to restrict personal freedoms (such as freedom of information) under Article 28J(2) of the Constitution but decided that the impugned law did not outline sufficient limits and procedures for the exercise of such restrictions. In particular, the procedures for banning books were arbitrary and did not afford due process, and as such, the Law created legal uncertainty, thereby contravening Article 28D(1) of the 1945 Constitution. This decision means that the government no longer enjoys a general power to censor or ban books, though it can still ban printed content using the 2008 Pornography Law.[133]

Finally, the Ministry of Communications and Information routinely censors online content, particularly pornography, under Ministerial Regulation 19 of 2014 on Internet Sites Containing Negative Content.[134] Although there was no clear legal basis for

[126] 'Court Upholds Censorship Ban on "Balibo" Film' *Jakarta Post* (6 August 2010) <http://www.thejakartapost.com/news/2010/08/06/court-upholds-censorship-ban-balibo039-film.html>.

[127] 'Censor Bans Hollywood's Biblical Epic' *Jakarta Post* (25 March 2014) <http://www.thejakartapost.com/news/2014/03/25/censor-bans-hollywood-s-biblical-epic.html>.

[128] 'Bandung Bows to FPI Protests and Tells Cinemas to Stop Screening' *Jakarta Post* (12 May 2011).

[129] James B Hoesterey and Marshall Clark, 'Film Islami: Gender, Piety and Pop Culture in Post-Authoritarian Indonesia' (2012) 36(2) *Asian Studies Review* 207, 222.

[130] 'SCTV Widely Criticized for Giving In to FPI' *Jakarta Globe* (29 August 2011) <http://jakartaglobe.id/archive/sctv-widely-criticized-for-giving-in-to-fpi/>.

[131] Although the banning of books was most frequent during the New Order period, the Law continued to be used in the democratic era. For example, in 2007, the Attorney General's Office (AGO) banned thirteen school history books, primarily because they failed to include the suffix 'PKI' (Partai Komunis Indonesia, Indonesian Communist Party) when referring to the 30 September Movement. The PKI was held responsible for a failed coup attempt on that date in 1965 that triggered mass killings of alleged Leftists and eventually led to Soeharto and the army seizing power. In 2009, the AGO banned five books: Asvi Warman Adam, 'Blunder Kejaksaan Agung dan Departemen Pendidikan Nasional' *Tempo* (15 March 2007) <https://nasional.tempo.co/read/news/2007/03/15/05595550/blunder-kejaksaan-agung-dan-departemen-pendidikan-nasional>; *Indonesia: Censorship of Books, Movies and Internet Use Blocks Discussions on Impunity* (Asian Human Rights Centre 2010) <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-049-2010>.

[132] 6-13-20/PUU-VIII/2010.

[133] Bunga Manggiasih, 'Pemerintah Anggap Pelarangan Buku Tetap Sah' *Tempo* (13 October 2010) <https://nasional.tempo.co/read/news/2010/10/13/063284573/pemerintah-anggap-pelarangan-buku-tetap-sah>.

[134] This regulation purports to implement Law 11 of 2008 on Information and Electronic Transactions but before it was revised in 2016 the Law did not, in fact, grant the Ministry authority to block sites. Art 18(a), Law 44 of 2008 on Pornography provides, however, that the government has the authority to break up networks that manufacture and distribute pornographic products or services, including by blocking pornography on the internet.

blocking websites in the original 2008 IET Law, the revised 2016 IET sought to clarify the government's authority to block websites. Two new provisions were inserted into Article 40 between points (2) and (3). Article (2a) provides that the government must prevent the spread and use of electronic information and/or electronic documents whose contents are forbidden in accordance with laws and regulations; and (2b) states that in conducting preventative activities as intended under (2a), the government can disconnect access or order an 'electronic system provider'[135] (such as an internet service provider) to disconnect access to electronic information and/or electronic documents whose contents violate the law.

RIGHT TO PRIVACY

Indonesian law does not expressly provide citizens with a right to privacy. However, the Constitutional Court has decided that citizens do have privacy rights, and that their communications, therefore, cannot be intercepted without proper legal authorization,[136] even though the Court did not clearly link that right to a constitutional provision. However, the Court did explain that the right was not non-derogable, and could, therefore, be limited by reference to Article 28J(2) of the Constitution.

The IET Law provides Indonesia's strongest statutory privacy protections to date.[137] Article 26(1) states that the personal data of an individual can be communicated through electronic media only with the approval of that individual, unless provided by law.[138] Article 26's elucidation explains:

> The protection of personal data in the use of information technology is part of the right to privacy. The right to privacy can be understood as follows:
> a) The right to enjoy a private life and be free from all disturbances.
> b) The right to communicate with others without being spied on.
> c) The right to monitor access to information about the personal life and data of a person.

If an individual's rights as described in Article 26(1) are violated, he or she may seek compensation in the form of damages. The 2016 revision of this Law added three provisions to this article, introducing the 'right to be forgotten' into Indonesian law for the first time. According to the Law, all electronic system providers must erase irrelevant information or documents under their control at the request of the relevant person based on a court order.[139] Electronic system providers are also expected to provide a mechanism for the erasure of such data.[140] Details of how this Law will be implemented are to be communicated in a government regulation, which, at the time of writing, had yet to be passed, but media and human rights activists have expressed concern that the provisions could be abused by the government to censor or eliminate past media reports.[141] The Indonesian Law also differs in an important way to similar provisions in the European Union. While

[135] 'Electronic system providers' are defined as every person, state agency, business entity, and member of the community who provides, manages or operates an electronic system for his or her own needs, or the needs of others (Art 1(6a)).

[136] 5/PUU-VIII-2010.

[137] Limited protections can also be found in Art 40, 1999 Telecommunications Law, which imposes general prohibitions on telecommunications interception.

[138] Art 26(1), 2016 Information and Electronic Transactions Law.

[139] Art 26(3), 2016 Information and Electronic Transactions Law.

[140] Art 26(4), 2016 Information and Electronic Transactions Law.

[141] Rofiq Hidayat, '5 Alasan ICJR dan LBH Pers Tolak UU ITE Hasil Revisi' *Hukumonline* (31 October 2016) <http://www.hukumonline.com/berita/baca/lt5816fa1df364a/5-alasan-icjr-dan-lbh-pers-tolak-uu-ite-hasil-revisi>.

the Spanish legislation, for example, relates to search engines, such as Google,[142] the Indonesian Law applies to all 'electronic system providers'.

The Press and Broadcasting Laws do not directly cover privacy but the Press Council's Journalistic Code of Ethics requires journalists to be professional, including by respecting privacy rights (Article 2(b)). The Code also requires journalists to respect their sources' private lives, unless disclosure would be in the public interest (Article 9). Specifically, journalists must not disclose the identities of sexual abuse victims or child offenders (below sixteen years of age).[143]

KPI Regulation 01/P/KPI/03/2012 on Broadcasting Guidelines requires broadcasters to respect the individuals' privacy rights in producing or broadcasting programmes, whether the programme is pre-recorded or live, unless in the public interest. Use of hidden cameras is not permitted unless in the public interest and the information cannot be obtained directly (Article 26).[144]

These privacy rights are only loosely observed by journalists. More recently, however, media regulators have become increasingly vocal about sensationalist invasions of privacy where the public interest is not apparent. The Press Council has, for example, admonished the media for privacy violations, particularly where the identities of victims of sexual harassment and abuse have been disclosed.[145]

DEFAMATION

In Indonesia, defamation is a civil or criminal matter; indeed, in some cases, *both* civil and criminal proceedings are pursued. The defamation provisions of Indonesia's Criminal Code, first introduced during the Dutch colonial period, have long been used to stifle public dissent in Indonesia. Even in post-independent Indonesia, these provisions (discussed further below) remain in force and have been regularly used to suppress and punish criticism and dissent. For example, the Soeharto government notoriously used the so-called *lese majeste* provisions—Articles 134, 136, and 137 of the Criminal Code—to pursue intentional insults or defamation of the president and vice-president. Also available were Articles 154–56 of the Criminal Code, which prohibited 'public expressions of hostility, hatred or contempt towards the Government of Indonesia'.[146]

The constitutionality of the *lese majeste* articles was successfully challenged in the Constitutional Court in 2006.[147] The Court ruled that Articles 134, 136, and 137 were unconstitutional because they 'negated the principle of equality before the law, and decreased freedom of expression of thoughts and opinions, freedom of information, and the principle of legal certainty'.[148] In 2007, the Court invalidated Articles 154 and 155 for facilitating

[142] Court of Justice of the European Union, *Press Release No 70/14: Judgment in Case C-131/12 Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González* (2014) <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-05/cp140070en.pdf>.

[143] 'Disclosure' here includes revealing enough information to enable a person to be more easily identified (Art 5).

[144] Art 13, Commission's Program Standards (SPS) also stipulates that programmes can cover the private lives of individuals only where doing so is in the public interest, which is defined as relating to the use of state funds, national security, or criminal justice.

[145] 'Privasi Korban Kejahatan Seksual Belum Terlindungi' *Hukumonline* (11 January 2012) <http://www.hukumonline.com/berita/baca/lt4f0d1de04a6f9/privasi-korban-kejahatan-seksual-belum-terlindungi>.

[146] Arts 134, 136, 137, 154–56, Indonesian Criminal Code (*Kitab Undang-undang Hukum Pidana*); Human Rights Watch (n 97) 10–12.

[147] Naomita Royan, 'Increasing Press Freedom in Indonesia: The Abolition of the Lese Majeste and 'Hate-Sowing' Provisions' (2008) 10(2) *Australian Journal of Asian Law* 90.

[148] Constitutional Court Decisions 013/PUU-IV/2006 and 022/PUU-IV/2006, p 15.

potential abuse of power, because 'they could easily be misinterpreted by public officials according to their will'.[149] According to the Court:

> [A] citizen who intended to express criticism or an opinion against the government, which is a constitutional right guaranteed by the 1945 Constitution, could easily be interpreted as expressing 'feelings of hostility, hatred, and contempt' towards the government.[150]

Some public officials disagree with these decisions and have sought to reinstate the provisions.[151] As we shall see, many Criminal Code provisions that enable highly effective subjugation of critics have either not been reviewed or have survived constitutional review, and are increasingly being used by politicians and commercially powerful figures. Several activists and journalists have been charged or ordered to pay compensation for producing reports critical of such figures, even though the reports were probably accurate and in the public interest.[152]

Criminal defamation

Chapter XVI the Indonesian Criminal Code covers defamation. Article 310 provides:

(1) Anyone who intentionally attacks the reputation or honour of another person by alleging a certain fact, with the clear intention of making that fact publicly known can be imprisoned for up to nine months.

(2) Where such an attack is put in writing or images for publication, the applicable sentence is up to one year and four months in prison.

(3) Such a representation will not qualify as slander or libel if the representation was clearly made in the public interest or in self-defence.

Most cases of defamation or slander are *delik aduan*, that is, they can be investigated and prosecuted only if the victim of the alleged crime files a complaint with police. Only alleged defamation or slander relating to the performance of public officials in carrying out their official duties need not be reported before investigation (Article 319).

Although the truth of the libellous or slanderous statement can be considered, it is not an absolute defence and, in many cases, judges have discretion whether to allow the defendant an opportunity to prove the truth of the statement. This discretion will be exercised only if the judge considers it necessary to assess whether the defamation was committed in the public interest or in self-defence. By contrast, in cases of alleged defamation of public officials carrying out their official duties, defendants should always be provided with the opportunity to prove the truth of the statement (Article 312). However, if a judge allows the defendant to attempt to prove that the statement was true, but the accused is not able to do so, and the statement is proved false, the defendant risks being found guilty of *fitnah* or perjury. Defendants who try to prove truth thus face considerable risk, as the penalty for perjury is up to four years' imprisonment (Article 311)—a much heavier sentence than for defamation.

Article 315 establishes the lesser crime of 'mild offence' (*penghinaan ringan*). This occurs where offence is caused in public or private, without slander or libel, and attracts a maximum sentence of four months and two weeks.[153]

[149] Constitutional Court Decision 6/PUU-V/2007, para [3.18.6], p 77.

[150] Constitutional Court Decision 6/PUU-V/2007, para [3.18.6], p 77.

[151] Kanupriya Kapoor, 'Indonesia Government Aims to Outlaw Insulting President, Sparks Uproar' *Reuters* (5 August 2015) <http://uk.reuters.com/article/uk-indonesia-politics-idUKKCN0QA0YP20150805>.

[152] One of the most notorious examples was the sentencing of former *Tempo* magazine editor Bambang Harymurti to twelve months in prison for defaming businessman Tomy Winata, discussed later.

[153] Art 315, KUHP.

Although articles prohibiting offending or defaming the president, vice-president, and public officials have been struck down, the Criminal Code still provides for harsh penalties for defamation of public figures. Under Article 316, a sentence for defamation can be increased by a third if the defamation relates to a public official. However, Articles 207 and 208 are perhaps the most problematic. Article 207 states that anyone who intentionally and publicly insults a public official or public body faces up to one year and four months in prison. Similarly, Article 208 provides that anyone who intentionally broadcasts, shows, or displays text or images that insult a public official or public body can be imprisoned for up to four months. Unlike other provisions discussed above, whether the content was true is irrelevant to Articles 207 and 208; it is sufficient that the public official perceives the representation as an insult. We note that both articles have survived judicial review by the Constitutional Court, which, in cases decided in 2008 and 2009, held that various constitutional free speech rights were overridden by Article 28G of the Constitution, which gives citizens (including public figures) rights to protection of their honour and reputation. In other words, the Court decided that the reputational rights of government officials prevailed over free speech rights.[154]

The IET Law provides even harsher penalties for defamation and, in recent years, it has emerged as a major threat to freedom of expression and democracy in Indonesia. Article 27(3) prohibits any person from 'intentionally distributing, transmitting, or making accessible electronic information and/or documents that contain insulting or defamatory content'. The revised Law added an elucidation to Article 27(1) that sought to further explain what was meant by the terms 'distributing', 'transmitting', and 'making accessible', although they remain broad and open to multiple interpretations. The revised Law added an elucidation to Article 27(3), stating that the provision refers to provisions on defamation and insult in the Criminal Code (KUHP). Penalties for violation are severe: up to four years' imprisonment and/or a fine of up to Rp 750 million (Article 45(3)). Until the recent revision, the maximum penalty was six years in prison and a fine of Rp 1 billion. This meant that defendants accused of defamation under the IET Law could be arrested and held for up to fifty days without trial.[155] Another important addition in the revised law is that defamation is now described as a *delik aduan* (Article 45(5)).

As mentioned, Human Rights Watch, Freedom House, AJI, and many other civil society organizations have expressed concern about use of these defamation articles to limit press freedom and freedom of expression.[156] Usman Hamid, the director of Amnesty International Indonesia, has reported that, according to Indonesian National Police data, there were only five online defamation cases each year in 2009 and 2010. By 2013, however, the number of cases had climbed to fifty-seven, with more than half based on the IET Law.[157]

There is growing concern that criminal defamation laws are being used to silence whistleblowers, particularly on corruption issues. In 2009, for example, two researchers working for Indonesian Corruption Watch, Illian Deta Arta Sari and Emerson Yuntho, were issued with a summons for alleged defamation. They had merely highlighted, at a

[154] Constitutional Court Decisions 14/PUU-VI/2008, 50/PUU-VI/2008 and 2/PUU-VII/2009.

[155] Human Rights Watch (n 97) 18. Pre-trial detention applies to offences carrying a sentence of more than five years, as well as specified offences, but not to KUHP's defamation articles. See Chapter 11.

[156] Human Rights Watch (n 97); Freedom House, 'Indonesia', *Freedom of the Press 2015* (Freedom house 2015) <https://freedomhouse.org/report/freedom-press/2015/indonesia>; Yohannie Linggasari, 'Ancam Kebebasan Pers, Dua Pasal UU ITE Diminta AJI Direvisi' *CNN Indonesia* (23 December 2014) <http://www.cnnindonesia.com/nasional/20141223132547-20-20021/ancam-kebebasan-pers-dua-pasal-uu-ite-diminta-aji-direvisi/>.

[157] Usman Hamid, 'Laws, Crackdowns and Control Mechanisms: Digital Platforms and the State' in Ross Tapsell and Edwin Jurriens (eds), *Digital Indonesia: Connectivity and Divergence* (ISEAS-Yusof Ishak Institute 2017) 94.

press conference, discrepancies between the amount the Prosecutor General's Office claimed to have recovered through corruption prosecutions and figures in a State Audit Agency (*Badan Pemeriksaan Keuangan*, BPK) report.[158] Some commentators fear that these provisions are also being used to intimidate witnesses so that they do not testify against powerful individuals.[159]

Another defamation case affecting a journalist involved Medan journalist Bersihar Lubis, who was charged and convicted under Article 207 of the Criminal Code after he wrote an article in *Tempo* newspaper criticizing the Attorney General's Office for banning student history books (this case is discussed in the section on censorship, above). Because of the article, '*Kisah Interogator Dungu*' ('The Tale of a Slow-Witted Interrogator'), the Depok District Court sentenced Lubis to one month in prison, or three months' probation. According to the judges, Lubis was sentenced because his article was opinion and not news, and as such, he was entirely responsible for the contents of the article.[160]

One of the most notorious uses of defamation provisions against journalists involved (now former) *Tempo* editor Bambang Harymurti. In March 2003, a *Tempo* journalist, Ahmad Taufik, published an article about a fire in the Tanah Abang textile market. The story noted that prominent business figure Tomy Winata had plans for a major renovation of the market complex and questioned ' … won't the fire, whether intentional or not, make the implementation of the plan a lot easier?'[161] Winata accused Taufik, another *Tempo* journalist, Iskandar Ali Thamrin, and chief editor Bambang Harymurti of defamation. The journalists were charged with defamation under Articles 310 and 311 of the Criminal Code, as well as Article 14 of Law 1 of 1946 on Provoking Disorder. On 16 September 2004, judges at the Central Jakarta District Court found Harymurti responsible for the story and sentenced him to one year in prison. Taufik and Thamrin were acquitted. Judges applied the Press Law, stating that as chief editor, Harymurti was responsible for the story. The decision was upheld on appeal to the Jakarta High Court in April 2005.[162]

In 2006, the Supreme Court overturned the criminal defamation conviction.[163] The Court found that the Central Jakarta District Court (and the Jakarta High Court) should have used the Press Law and not the defamation articles in the Criminal Code to decide the case. The Court emphasised that the press was the fourth pillar of democracy[164] and that the right of reply and mediation through the Press Council should be prioritized in cases like this. However, the Court noted that the protections offered by the Press Law only extended to journalists who complied with journalistic ethics and did not say that journalists should never be found guilty of criminal defamation.[165] This decision is considered highly influential by media activists, and, despite Indonesian courts not recognizing jurisprudence as understood in common law countries, other courts have followed it. We are aware,

[158] Frontline Defenders, *Indonesia: Human Rights Defenders Ms Illian Deta Arta Sari and Mr Emerson Yuntho Named as Suspects in Criminal Defamation Case* (2009) <https://www.frontlinedefenders.org/node/2204>.

[159] Desca Natalia, 'Enam Saksi Kasus Nazaruddin Diancam' *Antara News* (19 July 2013) <http://www.antaranews.com/berita/380902/enam-saksi-kasus-nazaruddin-diancam>; Bilal Ramadhan, *ICW Cemas Kasus Nazaruddin Di Polri dan Kejagung Bakal Mandeg Republika Online* (19 June 2013) <http://republika.co.id/berita/nasional/hukum/13/06/19/mon3r1-icw-cemas-kasus-nazaruddin-di-polri-dan-kejagung-bakal-mandeg>.

[160] Yudho Raharjo, 'Bersihar Lubis Divonis Satu Bulan' *Tempo* (20 February 2008) <https://metro.tempo.co/read/news/2008/02/20/057117837/bersihar-lubis-divonis-satu-bulan>.

[161] 'Ada Tomy di "Tenabang"?' *Tempo* (3 March 2003), cited in Janet E Steele, *Wars Within: The Story of Tempo, an Independent Magazine in Soeharto's Indonesia* (Equinox 2005) 272.

[162] 'Pengadilan Banding Kuatkan Vonis Bambang Harymurti' *Tempo* (29 April 2005) <https://nasional.tempo.co/read/news/2005/04/29/05560357/pengadilan-banding-kuatkan-vonis-bambang-harymurti>.

[163] Supreme Court Decision 1608/K/PID/2005.

[164] International Federation of Journalists, *Criminal Defamation: Tide Is Turning in South East Asia* (2006) <http://www.ifex.org/international/2006/02/22/capsule_report_tide_turning_against/>.

[165] Human Rights Watch (n 97) 36.

for example, of another Supreme Court case that referred to this decision and concluded that 'the right of reply is the correct mechanism rather than criminal charges'.[166]

Case study: Prita Mulyasari

One of the most controversial defamation cases in recent years involved Prita Mulyasari. In 2008, she was admitted to Omni International Hospital in Jakarta, where doctors initially diagnosed her with dengue fever but later revised their diagnosis to an infection. When her condition worsened, Prita decided to transfer to another hospital, and requested copies of her laboratory results, which Omni International Hospital refused to provide.

Annoyed, Prita wrote an email to about twenty of her friends, which was then shared on Facebook and eventually published in full online, including on Detik.com and Kompas.com.[167] Her doctors at Omni soon saw the email, filed a civil defamation lawsuit against her, and won. They also reported her for criminal defamation. In May 2009, Prita was arrested, held in pre-trial detention for three weeks, and ultimately charged with distributing electronic information containing defamatory or slanderous contents.[168]

Prita's criminal trial took place in the Tangerang District Court in June 2009. Prosecutors charged her under Article 27(3) of the IET Law, and Articles 310–11 of the KUHP. The Court dismissed the case without hearing its merits, finding that the prosecution had not proved its case.[169] Prosecutors appealed to the Banten High Court, which ordered the Tangerang District Court to rehear the case. On 29 December 2009, the Tangerang District Court acquitted her.

The case captivated the Indonesian media for months, and led to a groundswell of public support for Prita, especially on Facebook. A Facebook group, 'Coins for Prita' (*Koin Peduli Prita*), sought public contributions to help Prita pay the Rp 261 million she owed after losing the civil case. The Facebook group attracted at least 170,000 members.[170]

Prosecutors appealed to the Supreme Court, which in 2011—long after the social media support for Prita had subsided—overturned the District Court's decision, finding that the email went beyond criticism that served the public interest. The Supreme Court imposed a suspended sentence of six months' imprisonment.[171] Surprisingly, this verdict attracted very little media attention and social media support. Prita asked the Supreme Court to review its decision in a *Peninjauan Kembali* reconsideration and in September 2012, it finally decided that the email was not defamatory and found her not guilty.[172]

Defamation at civil law

Defamation can also be dealt with in court under the Civil Code, either independently or, as occurred in Prita Mulyasari's case, in addition to criminal defamation proceedings. Article 1372 of the Civil Code establishes defamation as an unlawful act, allowing victims to seek compensation for loss and to restore dignity and reputation. When determining

[166] Supreme Court Decision 84/PK/PID/2009, p 26.

[167] 'Inilah Curhat Yang Membawa Prita ke Penjara' *Kompas* (3 June 2009) <http://megapolitan.kompas.com/read/2009/06/03/1112056/inilah.curhat.yang.membawa.prita.ke.penjara>.

[168] Arjuna Dibley, 'Facebooking for Reform?' (2012) 110 *Inside Indonesia* <http://www.insideindonesia.org/facebooking-for-reform-2>.

[169] Ita Lismawati Malau and Fadila Fikriani Armadita, 'Kejaksaan Analisa Putusan Pengadilan' *Viva.co.id* (25 June 2009) <http://nasional.news.viva.co.id/news/read/69966-kejaksaan-analisa-putusan-pengadilan>.

[170] Dewi Kurniawati, 'People Power, Digital Style' *Jakarta Globe* (8 June 2009) <http://jakartaglobe.id/archive/people-power-digital-style/>.

[171] Supreme Court Decision 882/K/Pid.Sus/2010.

[172] Supreme Court Decision 22PK/Pid.sus/2011; 'Akhirnya, MA Bebaskan Prita Mulyasari' *Hukumonline* (18 September 2012) <http://www.hukumonline.com/berita/baca/lt5057d8e58f799/akhirnya--ma-bebaskan-prita-mulyasari>.

the compensation amount, judges must consider the severity of the defamation; the relative position, status, and financial means of the two parties; and the circumstances.[173] The plaintiff can ask the Court to declare that the impugned act constitutes defamation and order the defendant to publicize the decision at his or her own expense (Article 1373). Defendants can avoid having to do this by apologizing to the plaintiff, and acknowledging that the plaintiff is 'respectable', before the Court (Article 1374).[174]

The plaintiff must prove that the defendant intended to defame, and the Code establishes a presumption that defamation was not intended, if the alleged defamatory act was carried out in the public interest or in self-defence (Article 1376). Defamation suits must be filed within one year of the alleged defamation occurring (Article 1380).

The courts have also accepted that defamation can fall within Article 1365 of the Code, as is demonstrated by the Tommy Soeharto case study, below. As Indonesia's general tort provision, this states that 'a person that commits an unlawful act that causes damage to another person is required to compensate that person for his or her wrongdoing'.[175] As we shall see, this expansive definition makes it relatively easy to bring a successful defamation claim in Indonesia. This ease is due partly to 'unlawful' being interpreted broadly by Indonesian judges to include acts that are not strictly illegal but merely improper in the sense that they violate ill-defined community standards.

Case study: Tommy Soeharto v Garuda

Hutomo Mandala Putra (Tommy Soeharto), the youngest son of former President Soeharto, sued PT Garuda Indonesia, publisher PT Indo Multi Media, and several editorial, marketing, and communications staff, for a statement contained in the English version of Garuda's inflight magazine in December 2009. The article, 'A New Destination to Enjoy in Bali', promoted the Pecatu resort district in Bali. In the article, a footnote explained that the owner of the resort district was 'convicted murderer Tommy Soeharto'. It subsequently emerged that the disputed text was added by a translator, and was not included in the original copy.

Soeharto sued using Article 1365 rather than Article 1372.[176] Soeharto had, in fact, been sentenced to fifteen years in prison for ordering the murder of Syafiuddin Kartasasmita, a Supreme Court judge, but he spent only four years in prison. Soeharto did not dispute the truth of the statement, arguing instead that the statement was 'unlawful' because it was irrelevant to the article, was unsuitable given the type of publication, and served only to cause harm to Tommy Soeharto's reputation and resort business (PT Bali Pecatu Graha).[177]

On 24 May 2011, the South Jakarta District Court upheld Soeharto's claim. It found that the footnote had a harmful purpose and was irrelevant to the article, concluding that it had 'ruined the plaintiff's credibility as a local and international businessman'.[178] The Court ordered Garuda and Indo Multi Media to pay Rp 12.5 billion to Tommy Soeharto in compensation. It also ordered them to publish an official apology in three consecutive editions

[173] Art 1375 allows family members of a deceased person to file a defamation charge on behalf of their relative after he or she has died.

[174] Art 1374, Civil Code.

[175] This provision is discussed in Chapter 15.

[176] In addition to Art 1365, the court decided that the defendants had breached Art 1366, Civil Code, which imposes liability for damage caused by negligence or carelessness, and Art 1367, which imposes liability upon defendants for damage caused by people under their supervision (vicarious liability).

[177] 'Tommy Menang Lawan Majalah Garuda' *Hukumonline* (25 May 2011) <http://www.hukumonline.com/berita/baca/lt4ddce28fcbfe0/tommy-menang-lawan-majalah-garuda>.

[178] Heru Andriyanto, 'Court Awards Tommy $1.5 Million Damages for "Convict" Article' *Jakarta Globe* (24 May 2011) <http://jakartaglobe.id/archive/court-awards-tommy-15-million-damages-for-convict-article/>.

of the Garuda magazine, but rejected Soeharto's request that Garuda also publish apologies in major newspapers *Kompas, Tempo*, and *Bisnis Indonesia*.

FREEDOM OF INFORMATION

Prior to the enactment of Law 14 of 2008 on Disclosure of Public Information, commonly known as the Freedom of Information Law (the FOI Law), very few public bodies were required to disclose information to the public. Disclosure, if it occurred at all, was usually voluntary or the result of media pressure.

Article 2 of the FOI Law provides that 'all public information' is to be open and accessible to all users of public information. Some types of information can be kept confidential but only in highly restricted circumstances. Public information must be provided to those who request it quickly and on time, with minimum cost and through straightforward procedures.

All people have the rights to: view and know public information; attend public meetings to obtain information; and obtain copies of public information following requests in accordance with the Law; and share this information in accordance with the Law (Article 4(2)). Requests for public information must be accompanied by a reason for the request (Article 4(3)). Applicants have the right to take public bodies to court if their request for information is obstructed or fails (Article 4(4)).

The Law sets out compulsory reporting requirements for public institutions, political parties, and non-governmental organizations (NGOs). It also details the types of information that must be available periodically, immediately, and always (see Articles 9–12). These include financial reports; policy decisions; work plans and budgets; and contracts. The Law also specifies the information that should be made available following a request from an applicant. Generally, public institutions must provide or publish public information within the institution's authority, unless an exception applies. Exceptions include: information that threatens criminal investigations, national defence or security, diplomatic relations, or national economic security; and private personal documents (Article 17). They must make available judicial decisions, government rules and regulations, orders to cease investigations or prosecutions, law enforcement institution annual budgets, and expenditure reports (Article 18(1)). The information disclosed must be accurate, true and not misleading (Article 7(1)–(2)). Public bodies must also appoint an information management and documentation officer to handle requests for information, and must develop a request management system (Article 13(1)).

The Law sets out procedures for obtaining access to public information. It also establishes a Central Information Commission and requires the creation of regional information commissions in every province and—if necessary—county and city branches.[179] The Commission is responsible for overseeing general policy and guidelines for implementation of the Law, as well as receiving, examining, and deciding disputes relating to access to information.[180] The Law establishes procedures for resolving complaints, including through mediation and the administrative courts. It also imposes criminal penalties on public servants who fail to disclose or destroy information (see Articles 47–54), and, conversely, upon those who disclose excluded, confidential, information, including journalists.

[179] Art 24(1), 2008 Freedom of Information Law.

[180] The Central Information Commission consists of seven members, representing the government and society (Art 26, FOI Law). Members of the Commission are selected by the DPR from a list proposed by the president. He or she then formally approves the members selected by the DPR (Art 31). Provincial commissions have five members (Art 25(1)).

The FOI Law is a critical component for improving the transparency and accountability of public bodies. Implementation has, however, been mixed. On the one hand, a 2012 national study found that government agencies responded to just 104 of 224 requests,[181] partly due to limited financial resources and the weak capacity of government bodies at the county and regional levels.[182] Some commentators, including journalists, also fear that the categories of exempted materials are too broad, resulting in denial of legitimate requests for information.[183]

On the other hand, the Information Commission and courts have generally ruled in favour of information seekers, ordering disclosure of information that the government would have preferred kept secret.[184]

Freedom of information and state secrecy laws

Law 17 of 2011 on State Intelligence places further limitations on freedom of information and the press.

Article 1 defines intelligence secrets as 'information, items, personnel, and/or intelligence efforts, work or activities, whose secrecy is protected, so that they may not be accessed, known or possessed by parties who are not entitled to them'.[185] Article 25 categorizes as 'intelligence secrets' as matters that:

- endanger state security and defence;
- reveal Indonesia's natural wealth;
- harm national economic resilience;
- harm foreign affairs interests and foreign relations;
- reveal memoranda or documents, which because of their nature must be kept secret;
- endanger the state intelligence system;
- endanger access, security agents, and sources involved in intelligence functions;
- endanger the safety of state intelligence personnel; and
- reveal plans or activities related to intelligence functions.

These intelligence secrets are to remain confidential for twenty-five years, although the DPR can agree to extend this period (Article 25(4)). The Law also grants the National Intelligence Agency (*Badan Intelijen Negara*, BIN) power to nominate particular information as 'intelligence secrets' (Article 40(d)). The Law provides heavy penalties for disclosure of this information. Stealing, disclosing, or leaking it can result in up to ten years' imprisonment and/or a fine of up to Rp 500 million (Article 45).[186]

Leading up to, and immediately after, the passage of the Law, NGOs, such as AJI, expressed deep concern about the stifling effect of these heavy penalties and their potential to violate freedom of speech and the press. The broad definition of 'intelligence secret' caused concerns that citizens' rights to public information would be overridden.

[181] Centre for Law and Democracy, *Indonesia: Large RTI Requesting Exercise Leads to Key Recommendations* (2012) <https://www.law-democracy.org/live/indonesia-large-rti-requesting-exercise-leads-to-key-recommendations/>.

[182] Art 19 and TIFA Foundation, *Fulfilling the Right to Information: Baseline Assessment on Access to Information in East Nusa Tenggara, Indonesia* (Art 19 and TIFA Foundation 2010) <https://www.article19.org/data/files/pdfs/publications/fulfilling-the-right-to-information.pdf>.

[183] ARTICLE 19, *Country Report: The Right to Information in Indonesia* (ARTICLE 19, 2015).

[184] Simon Butt, 'Freedom of Information Law and Its Application in Indonesia: A Preliminary Assessment' (2013) 8(1) *Asian Journal of Comparative Law* 1.

[185] Art 1(6), 2011 State Intelligence Law.

[186] Negligent disclosure can result in up to seven years' imprisonment and/or a Rp 300 million fine.

In 2012, AJI and others sought review of the constitutionality of the State Intelligence Law before the Constitutional Court. The applicants argued that the Law violated Article 28F of the Constitution (which provides citizens' rights to information and freedom of expression), Article 28D (1) (which guarantees legal certainty), and Article 1(3) (which establishes Indonesia as a 'law state', a state subject to the rule of law). The Court refused to invalidate the Law,[187] however, noting that it was consistent with the exceptions already provided in the FOI Law.

[187] Constitutional Court Decision 7/PUU-X/2012.

PART V

PRIVATE LAW

22

Marriage, Divorce, and Inheritance

INTRODUCTION

This chapter deals with formation and termination of marriages, and the disposition of deceased estates. The law that applies to these areas varies according to the religion of the parties, with different systems applying to Muslims and non-Muslims. In practice, the system for Muslims overwhelmingly dominates litigation. For example, 98 per cent of all divorce cases in Indonesia relate to Muslim marriages,[1] despite Indonesia's non-Muslim population (comprising primarily Christians, Hindus, Buddhists, and Confucians) constituting approximately 13 per cent of the population.[2] For this reason, we focus on the rules applicable to Muslims and deal in less detail with the rules for other religious groups.

MARRIAGE LAW

Law 1 of 1974 on Marriage is the foundation of the legal regime governing marriage and divorce in Indonesia. It applies to all marriages made in Indonesia, including marriages between Indonesian and foreign citizens (Articles 57 to 62). Article 2 provides:

(1) Marriage is valid if performed according to the laws of each person's religion and beliefs.

(2) Every marriage must be registered according to prevailing laws and regulations.

In other words, for a marriage to be recognized by the state, the couple must, first, be married in a religious ceremony, and, second, register it with the state. In effect, the religious ceremony prevents the couple's relationship from being seen as fornication or illicit sex but registration is a prerequisite of state recognition.

Indonesian marriages are also regulated by subordinate instruments issued to implement the Marriage Law, including, most importantly, Government Regulation 9 of 1975 on the Implementation of Law 1 of 1974 on Marriage. The Compilation of Islamic Law (*Kompilasi Hukum Islam*, or 'Kompilasi') is also of critical importance. This is a guidebook for Religious Court judges that was accorded legal authority by Presidential Instruction 1 of 1991. It reiterates parts of the Marriage Law and the 1975 Government Regulation but adds further detail only relevant to Muslims, drawing on Islamic legal tradition. Again, marriages and divorces that do not comply with the Marriage Law and these subordinate regulations will not be recognized by the state. As we show later in this chapter, non-compliance can have serious consequences, particularly in divorce settlements and inheritance disputes. In some cases, it even incurs criminal punishment.

[1] Cate Sumner and Tim Lindsey, *Courting Reform: Indonesia's Islamic Courts and Justice for the Poor* (Lowy Institute for International Policy 2010) 18.

[2] Central Intelligence Agency, *The World Factbook: Indonesia*, 6 May 2016 <https://www.cia.gov/library/publications/the-world-factbook/geos/id.html>

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Age of marriage

Articles 6 and 7 of the Marriage Law prohibit persons under twenty-one years from marrying without parental consent. Even where that consent is given, men younger than nineteen and women younger than sixteen may not marry without judicial approval.

Rates of child marriage in Indonesia are high. About one-quarter of Indonesian girls are married before they turn eighteen, but in some parts of Indonesia the rate is one-third.[3] As in other countries, rates of child marriage tend to be higher in poorer and rural communities.[4] According to 2013 data from the National Socio-Economic Household Survey (*Susesnas*), about 11 per cent of girls are married before they turn fifteen (8.4 per cent in urban areas and 13.4 per cent in rural areas).[5] In 2014, concern about rates of child marriage led a coalition of gender activists to challenge the constitutionality of Article 7(1) of the Marriage Law, which establishes the sixteen year age limit for women and nineteen years for men.[6] In 2015, the Constitutional Court threw out the challenge, arguing that raising the minimum marriageable age to eighteen would not necessarily reduce divorce rates, or prevent health or other social problems.[7] In 2017, a group of former child brides launched another challenge to Article 7(1), arguing that it breached Article 27(1) of the Constitution on equal treatment before the law.[8] At time of writing, the Court had not yet decided this case.

Foreign marriage

The Marriage Law covers marriages that involve foreigners or take place overseas. Marriages between Indonesian citizens conducted overseas in accordance with the laws of that overseas country are recognized in Indonesia, provided they do not breach Indonesian law (Article 56). Within a year of returning to Indonesia, the Indonesian couple must register the marriage with the relevant local registry office (Article 56(2)).

Marriages between an Indonesian citizen and a foreign citizen conducted in Indonesia are also registrable in Indonesia, provided that the marriage satisfies the legal requirements for both an Indonesian marriage and a marriage in the country of the foreign citizen (Article 60). Indonesian law applies to such marriages (Article 59).

Civil servants

Civil servants must notify their office of their marriages within a year of them taking place.[9] They must obtain permission from their office to divorce.[10]

[3] UNICEF, 'Child Marriage in Indonesia' *UNICEF* <https://www.unicef.org/indonesia/UNICEF_Indonesia_Child_Marriage_Factsheet_.pdf>.

[4] ibid.

[5] Soedarti Surbakti and Theresa Devasahayam, *Women and Girls in Indonesia: Progress and Challenges* (United Nations Population Fund 2015) <http://indonesia.unfpa.org/application/assets/publications/BUKU_Monograph_No5_Women_Girls_08_Low-res.pdf>.

[6] Constitutional Court Decision 30-74/PUU/XII/2014. The applicants argued that the sixteen-year age limit violated a series of constitutional provisions, namely: Arts 28A, 28B(1) and (2), 28C(1), 28D(1), 28G(1), 28H(1) and (2), and 28I(1) and (2).

[7] Constitutional Court Decision 30-74/PUU/XII/2014, p 231.

[8] Marguerite Afra Sapiie, 'Child Bride Survivors Challenge Marriage Law at Constitutional Court' *Jakarta Post* (21 April 2017) <http://www.thejakartapost.com/news/2017/04/21/child-bride-survivors-challenge-marriage-law-at-constitutional-court.html>.

[9] Art 2, Government Regulation 10 of 1983 on Permission for Marriage and Divorce by Civil Servants.

[10] Art 3, Government Regulation 45 of 1990 amending Government Regulation 10 of 1983.

Muslim marriage

Chapters II to VII of Book I of the Kompilasi set out the formalities required for a Muslim religious ceremony to be recognized as religiously acceptable by the state. These include, among others: satisfaction of minimum age requirements; evidence of consent; the presence of a qualified *wali* or bridal guardian and qualified witnesses, all of whom must be Muslims; the formal making of a marriage contract; and the giving of a marriage gift (*mahr*) (Articles 15–38 ff). Article 44 of the Kompilasi prohibits a Muslim woman marrying a non-Muslim man.

Article 5 of the Kompilasi restates Article 2(2) of the Marriage Law, which, as mentioned, requires that the marriage be registered to be valid and adds that the purpose of mandatory registration is 'guaranteeing order for Muslim marriages'. Registration of Muslim marriages is governed by Article 2(1) of the Marriage Law, Articles 2–9 of Government Regulation 9 of 1975, and Articles 5 and 6 of the Kompilasi.[11] Registration is performed by the marriage registrar (*Pegawai Pencatat Nikah*) at the local branch office of the Ministry of Religious Affairs (*Kantor Urusan Agama*) in the district where the marriage took place. Upon registration, the couple are given a marriage deed or certificate (*Akta Nikah*), which they sign (Article 7 of the Kompilasi). This operates as the sole formal proof of the state's recognition of the marriage.[12] It usually forms part of, or accompanies, a Marriage Book (*Buku Nikah*). This Book contains a summary of aspects of the law applicable to marriage, including the grounds for divorce (Articles 45–46 of the Kompilasi).

As indicated above, a marriage that is made according to an Islamic ceremony but is not registered does not give rise to enforceable rights or impose any obligations on either spouse in the eyes of the state. Article 6(2) of the Kompilasi makes this clear, stating that 'A marriage made without the supervision of the Marriage Registrar does not have legal force.' Andi Syamsu Alam, former Deputy Chief Justice and head of the Religious Chamber of the Supreme Court, with overall authority for the religious courts, has written that an unregistered marriage is:

> … invalid. Despite the marriage being conducted pursuant to one's religion and beliefs the view of the state is that the marriage is deemed not to be valid if it has not been registered at the Office of Religious Affairs.[13]

Religious court jurisdiction for Muslim marriage disputes

Under Article 63(1) of the Marriage Law, the religious courts handle matters relating to Muslim marriages. Articles 1(1) and 49(1) of Law 7 of 1989 on the Religious Courts (as amended by Law 3 of 2006 and Law 50 of 2009) confirm this, establishing these courts as the judicial forum for marriage cases where the parties are Muslim or 'persons or legal entities that voluntarily submit themselves to Islamic law regarding matters that are within the jurisdiction of the Religious Courts'.[14]

While the caseload of the religious courts is overwhelmingly dominated by divorce, the Court also has jurisdiction over a range of other matters, listed in Article 49(2) of the Religious Courts Law and its elucidation. These include: permission for polygamous marriage;

[11] See also Law 32 of 1975 on the Registration of Marriage, Divorce and Rujuk (Reconciliation).

[12] See, for example, Direktorat Jenderal Pembinaan Kelembagaan Agama Islam, *Tanya Jawab Kompilasi Hukum Islam* (Departemen Agama 1998) 161, which states: 'Marriage can only be proved by a Marriage Certificate produced by the Marriage Registrar.'

[13] Andi Syansu Alam, 'Unregistered Marriage: Cases of Those Examined by the Supreme Court', in CT Yanggo (ed) *Marriages That Are Not Registered by the Government: The 2nd Period Discussion—Experts in Secular Law, Islamic Law and Adat Law* (Jakarta; German Organisation for Technical Cooperation (GTZ) Good Governance in the Popoulation Administration System (GGPAS) 2007) 35.

[14] Elucidation to Art 49, Law 3 of 2006.

division of property; child custody and guardianship; child and spousal maintenance; the legal status of children; and decisions relating to 'mixed marriages'.[15] Also within the jurisdiction of the religious courts are: inheritance (Article 49(b)); *wasiat*[16] (wills and testaments) (Article 49(c)); *hibah*[17] (bequests) (Article 49(d)); *wakaf*[18] (Article 49(e)); Islamic philanthropy: *zakat*,[19] *infaq*, and *sadaqah*[20] (Article 49(f), (g), and (h)); and 'Islamic economy' (*ekonomi syari'ah*) (Article 49(i)).

In 2008, the constitutional validity of Article 49 of the Religious Courts Law was challenged in the Constitutional Court.[21] The applicant argued that, by excluding the wider body of Islamic law from the jurisdiction of the religious courts, Article 49 infringed broad constitutional rights to religious freedom that he claimed were guaranteed to Muslims and Indonesian citizens alike. The Constitutional Court, however, relied on Articles 24(2) and 24A(5) of the Constitution (which formally establish the religious courts) to reject this argument, confirming that Islamic law in Indonesia only has force through positive law as administered in the courts. These constitutional provisions state that the religious courts' jurisdiction is determined by legislation. For the Court, then, the extent of that jurisdiction was entirely a matter for the national legislature, the DPR (*Dewan Perwakilan Rakyat*, People's Representative Assembly), because 'the highest law is the 1945 Constitution, not the Qur'an'.[22] Islamic law, the Constitutional Court held, was not national law per se but rather something that 'can be used together with other sources of law and, in this way, can be material for the creation of government laws that are in force as national law'.[23]

Since colonial times, Indonesia's religious courts have not applied Islamic procedural or evidentiary law. Article 54 of the Religious Courts Law requires that they instead follow the secular procedural laws applied in the general civil courts (*pengadilan umum*), and places them under the administrative and appellate authority of the national Supreme Court (*Mahkamah Agung*). When exercising their exclusive jurisdiction over marriage in cases involving Muslims, the religious courts are not, therefore, permitted to apply *fiqh* (traditional Islamic jurisprudence); rather, they must apply state laws—usually the Kompilasi. In 2001, the then Directorate for Religious Justice in the Department of Religious Affairs examined 1,008 religious court decisions, finding that every one of them was based on the Kompilasi, with 71 per cent explicitly stating this in the judgment itself.[24]

Polygamy

According to traditional *fiqh*, a Muslim man has a right to take up to four wives at once. The Marriage Law and Kompilasi both permit polygamy in principle but only with judicial approval and if the man can prove that he is able to deal equally with all wives and their children.[25] This is a significant obstacle, especially when read with the conditions the applicant must meet before judicial approval can be granted. The husband must, for example,

[15] For more complete descriptions of these areas of jurisdiction, see the elucidation to Art 49(2), Law 7 of 1989 on Religious Courts, and the elucidation to Art 49(a), Law 3 of 2006.

[16] *Wasiat* (Ar. waṣīya).

[17] *Hibah* (Ar. *hiba*).

[18] *Wakaf* (Ar. *Waqf*) is the permanent dedication by a Muslim of property, usually land, for purposes recognized by Islamic law as pious, religious, or charitable.

[19] *Zakat* (Ar. *zakat*) is the charitable contribution that Muslims must make under Islamic law.

[20] *Infaq* (Ar. *'infāq*) and *sadaqah* (Ar. *ṣadaqa*) are forms of voluntary charity.

[21] Constitutional Court Decision 19/PUU-VI/2008.

[22] See Constitutional Court Decision 19/PUU-VI/2008, para [3.18]. The quotation is from Justice Muhammad Ali and was made in the course of the hearings.

[23] Constitutional Court Decision 19/PUU-VI/2008, para [3.18].

[24] Marzuki Wahid, 'Reformation of Islamic Family Law in Post-New Order Indonesia: A Legal and Political Study of the Counter Legal Draft of the Islamic Law Compilation' in Ota Atsushi, Okamoto Masaaki and Ahmad Suaedy (eds), *Islam in Contention: Rethinking Islam and State in Indonesia* (Wahid Institute 2010).

[25] Arts 55–59, Kompilasi; Arts 3(2), 4, and 5(1)(c), Marriage Law; Arts 40–44, Government Regulation 9 of 1975.

show that his existing wife is unable to 'perform her function as a wife', is incurably ill, physically incapacitated, or is barren.[26] Even where these can be shown, Article 58(1) of the Kompilasi states that the husband must also fulfil the conditions in Article 5 of the Marriage Law—namely, he must have the permission of his existing wife or wives, and be able to fulfil the basic needs of his wives and children.[27]

Religious courts in some regions appear to have not always strictly applied these provisions. Hooker has shown, for example, that between 2003 and 2005, judges in Surabaya approved many applications for permission to marry polygamously, requiring little more than nominal compliance with the regulatory requirements.[28] Butt likewise points out that, although polygamous marriages are still rare, they may be becoming less so:

> According to *Hukumonline*—Indonesia's leading source of legal news—1,016 applications for permission to marry polygamously were lodged in 2004, of which 800 were approved; in 2005, 186 were approved from 989 applications; and, in 2006, 776 were approved from 1,148. While this seems quite a small number, given Indonesia's population, the proportion of approvals may support claims of a return to a relatively permissive approach to polygamy.[29]

The principles in the Kompilasi nonetheless prevent unrestrained polygamy and are supported by the Marriage Law (Articles 3–5), Government Regulation 9 of 1975 (Chapter VIII, Articles 40–44), and criminal penalties. Under Article 279 of the Criminal Code, parties to a polygamous marriage that is not judicially approved face five to seven years' imprisonment. Law 23 of 2006 on Civil Registration also imposes a Rp 1 million fine for failure to register a registrable marriage (Article 90) and up to Rp 1 billion and ten years' imprisonment for bureaucratic fraud associated with marriage registration (Articles 92–98).

Criminal provisions are, however, rarely applied to informal polygamous marriages, even high-profile ones.[30] In fact, most polygamous marriages in Indonesia are *kawin siri, di bawah tangan*, or *kawin kampung* (village marriage)—that is, made according to religious or traditional rites but never registered. This reflects the common failure of many rural or poor Indonesians to register even their monogamous marriages. Another reason is the relative rarity of judicial approval for polygamous marriage. Yet another is that a marriage validly conducted according to one of the six official religions,[31] as mentioned, often brings some benefits to the parties, even if the state will not enforce or recognize it until registered. (As mentioned, their marriage might, depending on the religion they follow, prevent allegations of illicit cohabitation or sex.) This is true, however, only where no legal barriers to such a marriage exists. Obviously, such a barrier exists in the case of a polygamous marriage without judicial approval but this point is not widely appreciated.

In 2007, the provisions of the Marriage Law dealing with polygamy were upheld by the Constitutional Court in response to a challenge by Mohammad Insa, a Muslim entrepreneur, who argued that they infringed his right to freedom of religion under Articles 28E and 29 of the Constitution.[32] He also relied on Article 28B(1) of the Constitution, which recognizes the right to create a family and continue a lineage through a valid marriage. The Court rejected

[26] Art 57, Kompilasi.

[27] Art 58(3), Kompilasi. The judge can dispense with this requirement if permission is not forthcoming and there has been no word from the wife or wives for at least two years, or permission is impossible to obtain.

[28] MB Hooker, *Indonesian Syariah: Defining a National School of Islamic Law* (Institute of Southeast Asian Studies 2008) 12–13.

[29] Simon Butt, 'Islam, the State and the Constitutional Court in Indonesia' (2010) 19(2) *Pacific Rim Law & Policy Journal* 279, 291.

[30] Although the Supreme Court upheld a conviction under Art 279, Criminal Code for illegal polygamy, in Decision 2156/K/Pid/2008.

[31] The six official religions are Islam, Protestant Christianity, Catholic Christianity, Hinduisim, Buddhism, and Confucianism: Kate O'Shaughnessy, *Gender, State and Social Power in Contemporary Indonesia: Divorce and Marriage Law* (Routledge 2009) 67–69, 178.

[32] Constitutional Court Decision 12/PUU-V/2007.

the Article 28B(1) argument, holding that while the Marriage Law restricted polygamy it did not prevent Muslims from marrying, even polygamously.[33] In response to Insa's argument based on Articles 28E and 29, the Court adopted submissions put forward by the government to the effect that the basic principle of marriage in Islam is monogamy. 'In theory and practice,' the government had argued, 'polygamy is not something that must be done. Rather, it is a door that can be used in emergencies.'[34] The Court therefore held that polygamy, while permitted by Islam, is not mandatory.[35] If it is to take place at all, the state must ensure that the existing wife or wives are treated fairly and equally. The Marriage Law provisions on polygamy achieve these aims, the Court held, and thus do not infringe Islamic teachings. Because the provisions do not limit the freedom of Muslims to practise their faith, they therefore did not breach the guarantees of religious freedom in Articles 28 and 29.

Non-Muslim marriage

Marriage for non-Muslims follows a regulatory scheme broadly similar to that for Muslims. As mentioned, pursuant to Article 2 of the Marriage Law, the state will not recognize a marriage, including one between non-Muslims, unless the couple are married in a religious ceremony and the marriage is then registered.

Once a non-Muslim religious ceremony has been conducted, the couple then register it at the local civil registry office, maintained by the Ministry of Home Affairs, rather than at the local religious affairs office, as in the case of Muslims. Documentation is managed similarly to Muslim marriages, however, and a civil registry official prepares the marriage certificate, which the couple then sign to record and formalise their marriage in the eyes of the state.

The relevant courts for marriage disputes involving non-Muslims are those of general jurisdiction (*peradilan umum*) (Article 63(1) of the Marriage Law), not the religious courts.

Interfaith marriage

Indonesian law does not specifically address interfaith marriage and the provisions in the Marriage Law on marriages between Indonesian citizens and foreigners do not touch on the question of religion.[36]

As noted above, however, a marriage is only valid 'if performed according to the laws of each person's religion and beliefs' (Article 2(1) of the Marriage Law). Islamic teaching does not allow Muslim women to marry non-Muslim men, and this is reflected in Article 44 of the Kompilasi, as noted above. Some Christian churches also refuse to perform interfaith marriages. As mentioned, marriages must be registered with the local branch of the office of religious affairs (for Muslims) or the local civil registry office (for non-Muslims) to be considered valid. These offices will not register a marriage unless a couple has first been married in a religious ceremony. This means that in practice, state recognition of an interfaith marriage is effectively impossible in Indonesia. There is, however, an unresolved question about whether a couple could hold two religious ceremonies, one for each member of the couple, and still have a valid marriage under Indonesian law.

In a well-known case in the 1980s, the Supreme Court ruled that the civil registry office can recognize interfaith marriages.[37] The case involved a Muslim woman, Andi Vonny Gani Parengi, and a Christian man, Adrianus Petrus Hendrik Nelwan, who had tried to

[33] Constitutional Court Decision 12/PUU-V/2007, paras [3.15]–[3.16].
[34] Constitutional Court Decision 12/PUU-V/2007, para [2.2.2].
[35] Constitutional Court Decision 12/PUU-V/2007, para [3.15.4].
[36] See generally Simon Butt, 'Polygamy and Mixed Marriage in Indonesia: Islam and the Marriage Law in the Courts' in Tim Lindsey (ed), *Indonesia: Law and Society* (2nd edn, Federation Press 2008).
[37] Supreme Court Decision 1400K/PDT/1986.

register their marriage with the office of religious affairs and civil registry, respectively, and were rejected by both. The Supreme Court held that nothing in the Marriage Law forbids interfaith marriage and ruled that, as no other state institution could recognize the marriage, the civil registry should do so.[38] It also noted that there was a 'legal vacuum' on the issue of interfaith marriage, and a solution needed to be found quickly, as Indonesia's plural nature meant such marriages were common. However, the government has never responded to the Court's call to clarify this area of law, and there can be no certainty that the Supreme Court would decide a similar case the same way today, given the rise of Islamic conservatism over the last two decades.

The general interpretation of Article 2 as outlawing interfaith marriage was unsuccessfully challenged at the Constitutional Court, in 2014.[39]

DIVORCE LAW

Muslim divorce

Unlike marriage, formalizing divorce in Indonesia is primarily a matter for the courts, not the bureaucracy. Article 115 of the Kompilasi provides that for Muslims '[d]ivorce can only be effected in a hearing before the Religious Court … '. As Hooker says, in Indonesia:

> Divorce is now essentially a matter of judicial process. While the [Kompilasi] does retain the classical steps of repudiation (articles 118ff) these must be gone through in the religious court … '[40]

The Kompilasi therefore refers to the classical grounds of divorce—*talak* for men and *khuluk* for women—but displaces the traditional *fiqh* (Islamic jurisprudence) on which they are based. The man may still utter the traditional '*talak*' (I divorce you) to his wife but to be effective he must do so in court and with judicial permission, which is granted only if, in earlier proceedings, the Court decides the requirements for divorce are met, as discussed in the next paragraph. '*Talak*' uttered outside the court has no legal effect (Articles 117, 123, and 129 of the Kompilasi).

Either the husband or wife can initiate divorce proceedings on grounds set out in the Marriage Law, the 1975 Government Regulation, and the Kompilasi. These grounds are the same for Muslims and non-Muslims, and are summarized in Article 19 of the Government Regulation, as follows:[41]

a) One party commits adultery, becomes an alcoholic, addict, gambler, or other such thing that is hard to cure.

b) One party leaves the other party for two consecutive years without the agreement of that other party and without a valid reason or any other circumstance outside their control.

c) One party receives a prison sentence of five years or more during the marriage.

d) One party commits an act of severe abuse or brutality that endangers the other party.

e) One party incurs a physical disability or sickness that results in an inability to fulfil their obligations as a husband or wife;

f) Between husband and wife there is ongoing conflict and disagreement and there is no hope of them living together harmoniously.

[38] Diana Kusumasari, 'Kawin Beda Agama Menurut Hukum Indonesia' *Hukumonline Klinik* (4 March 2011) <http://www.hukumonline.com/klinik/detail/cl290/gimana-caranya>.

[39] Constitutional Court Decision 68/PUU-XII/2014.

[40] Hooker (n 28) 24.

[41] See also Arts 113–28, Kompilasi.

The most common ground of divorce relied upon is (f), which is much wider than the first five grounds, and overlaps with them. The broadness of 'ongoing conflict and disagreement' makes it relatively easy to establish. Divorce is thus usually a procedural process in the religious courts and is relatively quick, often being completed with just one or two hearings, sometimes within only a few months. This is true for both male and female plaintiffs and, indeed, women bring twice as many applications for divorce in the religious courts as men, and are almost always successful.[42]

Divorce cases can be decided in the absence of one of the spouses, provided the Court finds that sufficient efforts have been made to ensure service. Articles 131 and 138 of the Kompilasi and Articles 26 and 27 of the Government Regulation make the Court responsible for calling the parties and other individuals to attend court. A court official appointed by a chief judge (or chair, *ketua*) of the religious court performs this task. Where the residence of the person called is known, but he or she cannot be located, the call can be forwarded through the relevant *lurah* (village head) (Article 26(3) of the Government Regulation). Article 139 of the Kompilasi adds that if the defendant's residence is not clear or fixed, service can be effected simply by placing a copy of the call on the court's notice board and making a public announcement as directed by the court. This will usually be a newspaper advertisement or national radio announcement. Article 140 requires the call to be made through diplomatic representatives if the defendant is overseas.

Article 146(2) of the Kompilasi provides that divorce is considered to have occurred from the moment the religious court decision acquires 'binding legal force' (*kekuatan hukum tetap*), that is, all rights of appeal are exhausted. Once this happens, the registrar sends a copy of the decision to the local marriage registrar (so the marriage register can be amended), advises the husband and wife in writing, and amends the Marriage Certificate (Article 147).

Appeal

Appeals from the religious court lie to the provincial High Religious Courts and then to the Supreme Court in Jakarta. In certain circumstances, the Supreme Court might approve an internal review or reconsideration of one of its own appeal or cassation decisions by another panel of Supreme Court judges. This is known as a *Peninjauan Kembali* or PK, and, like the appeals and cassation processes, is discussed in more detail in Chapter 4.

Division of property on divorce

Article 86(1) of the Religious Courts Law allows a claim for property division to be made with the divorce application or after the divorce decision acquires binding legal force.

Book II of the Kompilasi[43] follows the Marriage Law in setting out a clear distinction between, first, property brought into the marriage by the husband or wife (*harta bawaan*); and, second, property acquired during the marriage (*harta bersama*, also known as *harta gono-gini*).

These two classes of property are dealt with differently if a marriage ends. Property brought into the marriage by the husband or wife always remains his or her own property unless they agree to the contrary,[44] even after divorce or death. On death, this 'pre-marital' property forms part of the deceased estate and is distributed to the deceased's heirs according to the version of the *fara'id* (Muslim inheritance) rules set out in the Kompilasi (discussed below).

[42] Sumner and Lindsey (n 1) 20.
[43] See also Chapter VII, Marriage Law, especially Art 53.
[44] Direktorat Jenderal Pembinaan Kelembagaan Agama Islam (n 12) 174.

As to jointly acquired matrimonial property, on divorce, each spouse takes half.[45] If a spouse dies, half 'goes to the survivor … and is excluded from application of the [*fara'id* rules]' (Article 96 of the Kompilasi).[46] The other half is deemed part of the deceased's estate and, again, is distributed according to Kompilasi rules.

Pre-nuptial agreements

Article 29(1) of the Marriage Law provides for pre-nuptial agreements on the division of assets, which are to be made before or at the time of marriage. In 2016, the Constitutional Court issued a 'declaration of conditional unconstitutionality' (see discussion in Chapter 5), ruling that Article 29(1) was unconstitutional unless it was interpreted as follows:

> Before, at the time of the wedding, *or during marriage*, the two parties can mutually agree to a written contract, authenticated by a marriage registrar *or notary*, following which it will also apply to third parties as far as it concerns them.[47]

Custody and maintenance

Cases relating to custody of children can be resolved in separate proceedings or as part of divorce proceedings (Article 66(5) of the Religious Courts Law). They may be brought by either husband or wife (Article 78).

The religious courts generally follow a 1996 Supreme Court decision,[48] which requires a person seeking custody of Muslim children to have 'religion' (that is, Islam).[49] Article 2 of Law 23 of 2002 on Child Protection establishes two custody award principles: non-discrimination and the best interests of the child. However, the courts do not consider this permits non-Muslims to obtain custody of a Muslim child. Non-Muslim litigants seeking custody over Muslim children who rely on Article 2 will usually fail.[50]

Indonesian courts rarely award joint custody, preferring to grant exclusive custody to one parent. If the child is over twelve years old or has reached puberty, he or she can decide which parent will have custody. If the child is under that age, the Kompilasi, following mainstream Sunni doctrine, provides that the mother is to have custody (Article 105(a) of the Kompilasi). The Kompilasi goes on to state that custody may be transferred if in the best interests of the child (Article 156(c)). Mothers are occasionally declared 'inappropriate',[51] which makes custody with them not in those best interests. 'Inappropriate mothers' include drug addicts and those who are promiscuous, which is assumed to be inconsistent with piety and thus good motherhood, and even some mothers planning to remarry. Working mothers are sometimes also denied custody on the presumption that employment might leave inadequate time to care for the child.[52]

Even if the mother is declared 'inappropriate', the father will often not be granted custody. This is because Article 156(a) of the Kompilasi provides that if the mother dies, custody of her child should go to a close female relation on her side, usually the child's grandmother, before going to the father.[53] This provision is often also applied where the mother is alive but 'inappropriate'.

[45] See also Art 35, Law 1 of 1974 on Marriage. [46] Hooker (n 28) 25.
[47] The expanded interpretation determined by the Court is in italics.
[48] Supreme Court Decision 210/K/AG/1996.
[49] Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts* (Amsterdam University Press 2010) 145–46.
[50] See Supreme Court Decision 382/K.AG/2012. [51] Nurlaelawati (n 49) 145–46.
[52] ibid 144.
[53] Art 156(a), Kompilasi: 'A child who is not yet mumayyiz has a right to be maintained by its mother, provided that if the mother has died, then she is replaced in this role by: 1. women above the mother in her direct line of descent; 2. the father.'

Regardless of who is awarded custody, both parents remain obliged to care for and educate their children (Article 41(a) of the Marriage Law), although non-custodial fathers often ignore this.[54]

A divorced wife is entitled to maintenance or alimony (*nafkah iddah*) to cover her living costs during the ninety-day *iddah* waiting period before she can remarry (Article 152 of the Kompilasi). She can also claim a *mut'ah*[55] gift in the form of money or property, calculated on the basis of her former husband's means (Articles 149, 158, 159 of the Kompilasi). Many divorced husbands ignore religious court orders to pay *idaah* and *mut'ah*, particularly if they have taken no part in the court process, for example, if the wife's divorce application is based on abandonment. Many religious court judges therefore pay more attention to ensuring that the property settlement adequately provides for the former wife and the children of the marriage.[56]

Rujuk

A divorced couple in Indonesia can, in certain circumstances, reconcile and reconstitute their marriage (Article 10 of the Marriage Law). Like marriage and divorce, this right, known as *rujuk* in the case of Muslim remarriage, is regulated by the state and requires registration to be effective. However, a man may only remarry the same woman twice. If, after a third divorce, he wishes to marry her for a third time, he must wait until she has married and divorced someone else (Article 120 of the Kompilasi).

Non-Muslim divorce

As in the case of marriage, non-Muslim divorces broadly follow the scheme established by the Marriage Law and Government Regulation 9 of 1975, as just described for Muslim divorces, except that the Kompilasi does not apply.

Again, divorce can only be obtained from a court, but non-Muslim divorces fall within the jurisdiction of the district courts, not the religious courts (Article 39(1)). The grounds for divorce are, once again, set out in Article 19 of Government Regulation 9 of 1975.

Likewise, child custody claims are made to the district court (Article 41(a) of the Marriage Law). The Court may order the husband to pay his former wife alimony (Article 41(c)), although, as noted, the courts, in practice, often regard property settlement as sufficient support for the wife.

Property settlement in non-Muslim divorce follows the model for Muslim divorces, recognizing the distinction between *harta bawaan* and *harta bersama*, but is governed by the Civil Code. Article 128 of the Code provides, for example, that joint marital property shall be divided into equal parts between the husband and wife, or each of their heirs. Chapter 17 of Book II of the Civil Code concerning separation of estates applies to the division of joint marital property. Article 1066, which is in that chapter, states that such a division may be sought from a court at any time.

The procedures for summoning parties and recording divorces resemble those for Muslim marriages, but the relevant registry is the civil registry office, maintained by the Ministry of Home Affairs.

[54] Nurlaelawati (n 49) 144.
[55] *Mut'ah* (Ar.) consolatory gift by a husband to wife on divorce.
[56] Nurlaelawati (n 49) 145–46.

INHERITANCE LAW

Indonesia has two inheritance law regimes. For non-Muslims, the Civil Code is the main source of inheritance law; for Muslims, it is principally the Kompilasi. Traditional customary law, or *adat*, has also been an important source, but applies differently across the archipelago. Indonesians were previously able to choose the inheritance law applicable to them.[57] In 2006, however, the national legislature removed this 'choice of law' rule for inheritance. With few exceptions, then, the religious courts now apply the Kompilasi to Muslims, and the district courts apply the Civil Code to non-Muslims.[58]

Muslim inheritance

Inheritance law has assumed great symbolic importance in Indonesia's Islamic legal system.[59] Traditional *fara'id* (Islamic inheritance law) identifies two essential groups of inheritors: the *asabah* or male agnatic kin, and the *ashabu'l fara'id*, who receive the residuary, which includes women.[60] The Qur'anic provisions supplemented customary Arab practice, leading to claims that these provisions were not intended as a complete system.[61] As a result, two conflicting interpretations of inheritance in Indonesian Islamic jurisprudence have emerged: the traditional Syafi'i approach, and that of Professor Hazairin. He was an influential University of Indonesia academic who laid out a new, revisionist approach to Islamic inheritance in the 1950s.[62]

The Syafi'i interpretation has traditionally been dominant in Indonesia, and reflects patrilineal Arabic tradition, where men take priority in the allocation of inheritance shares. The Qur'an sets out mathematical rules for dividing the estate among different classes of heirs.[63] The Syafi'i interpretation applies these rules to defined priority classes and excludes lower-ranked classes. The estate is first apportioned to the primary class and, if no member of that group remains alive, it goes to the second group and then the third, according to the apportionment set out in *Sura An-Nisa* of the Qur'an, at verses 11 and 12.[64] The Syafi'i interpretation distinguishes between full, consanguine, and uterine siblings of the deceased, and restricts inheritance to blood relations, thereby excluding adopted children.

Hazairin's theory resembles the Syafi'i approach but differs in key respects—most notably, the priority of classes, and the concept of representation. According to Hazairin, the Qur'an does not intend to exclude classes but rather provides that if an heir from one class is missing, he or she can be represented by his or her heirs. This means, for example, that in the absence of a son but the presence of a grandchild, the grandchild can represent the son and take his inheritance. In the Syafi'i interpretation, the grandchild cannot inherit until the first two classes are exhausted; and if there are people present in the first class, they take to the exclusion of the later class, and so on.[65]

[57] D Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions* (University of California Press 1973) 152.

[58] The General Elucidation to Law 7 of 1989 on the Religious Courts had provided Indonesians with the ability to choose which system would apply for matters of inheritance. This was removed from the General Elucidation by Law 3 of 2006 amending Law 7 of 1989 on the Religious Courts. Greater clarity was also provided by Art 50(2), which stated that if the relevant parties are Muslims, then matters of inheritance will be heard in the religious courts. See Michael Feener and Mark Cammack, 'The Islamic Legal System in Indonesia' (2012) 21(1) *Pacific Rim Law & Policy Journal* 13, 29; Mark Cammack, 'Indonesia's 1989 Religious Judicature Act: Islamization of Indonesia or Indonesianization of Islam?' (1997) 63 *Indonesia* 143, 157.

[59] Mark Cammack, 'Islamic Inheritance Law in Indonesia: The Influence of Hazairin's Theory of Bilateral Inheritance' in Tim Lindsey (ed), *Indonesia: Law and Society* (2nd edn, Federation Press 2008) 329.

[60] Lev (n 57) 186. [61] Cammack (n 59) 330–32.

[62] Yeni Salma Barlinti, 'Inheritance Legal System in Indonesia' (2013) 3(1) *Indonesia Law Review* 27.

[63] David Powers, 'The Islamic Inheritance System: Introduction' (1998) 5(3) *Islamic Law and Society* 285.

[64] Barlinti (n 62) 28. [65] Cammack (n 59) 333–34.

Controversially, Hazairin also read the Qur'an to accommodate a bilateral inheritance system, whereby a daughter can inherit to the exclusion of the next class, even if it includes male agnates. This is based on reading the Qur'anic term *walad* to mean 'child' instead of son, so that the daughter is entitled to the first priority class of shares, just like the son, even though she will not receive an equal proportion.[66] Many see this approach as more consistent with contemporary Indonesian attitudes.[67]

As will be seen, the Kompilasi largely follows the Syafi'i approach, rejecting Hazairin. However, the Kompilasi does contain some ambiguity, which Cammack suggests was intentional, to allow inheritance law to modernize through judicial interpretation.[68] For instance, the Kompilasi is unclear about whether a daughter will exclude remaining classes if there is no son, using the gender neutral term *anak*, for *walad*, rather than *anak laki-laki* (male child).

The Supreme Court has used this lack of specificity to claim to rely on the Kompilasi, while following Hazairin's thinking.[69] The Supreme Court's cassation decision in the *Inaq Putrahimah* case provides an example of this.[70] Amaq Nawiyah of Lombok died, leaving land in the control of her brother, who also died shortly thereafter. Amaq's sole daughter, Inaq Putrahimah, claimed the land but was sued by descendants of the brother. The case was appealed to the Supreme Court, which held that Inaq, as the sole remaining child, excluded other inheritors due to the strength of her blood relationship with the deceased, regardless of her gender. The Court decided that Inaq had an exclusive right to inherit the estate, interpreting '*walad*' to mean 'child', not 'son', reflecting the Hazairin approach. Some commentators see this as an attempt by the Court to harmonize the Kompilasi's approach to inheritance with the Civil Code's (discussed below). Regardless, it demonstrates the Court's willingness to depart from the traditional Syafi'i approach, at least in the 1990s.[71]

Inheritance in the Kompilasi

The Second Book of the Kompilasi deals with inheritance. The following is a summary of the rules.

- If a daughter is the sole child, she obtains half of the estate; if there are two or more daughters together they obtain two-thirds; and if there are both daughters and sons, a son will receive two parts for every one received by a daughter.[72]
- If the deceased does not leave a child, the father receives a third; if there is a child, the father receives a sixth.[73]
- The mother will receive a sixth if there is a child or two or more siblings. If there are no children and not two or more siblings, then she receives a third.[74]
- The mother will receive a third of the remainder after the widow or widower and the father have taken their share.[75]
- A widower receives half of the share if the deceased does not leave a child; and if the deceased leaves a child, then he obtains a quarter.[76]

[66] ibid.
[67] Ratno Lukito, 'The Enigma of National Law in Indonesia: The Supreme Court's Decisions on Gender-Neutral Inheritance' (2006) 52 *Journal of Legal Pluralism and Unofficial Law* 147, 148.
[68] Cammack (n 59) 333–34. [69] Lukito (n 67) 162–64; Cammack (n 59) 341.
[70] Mataram Religious Court Decision 85/Pdt.G/92/PA.MTR; Mataram High Religious Court Decision 19/Pdt.G/1993/PTA.MTR; and Supreme Court Decision 86K/AG/1994 of 28 April 1995, cited in Lukito (n 67) 157–60.
[71] Mark Cammack, 'Inching toward Equality: Recent Developments in Indonesian Inheritance Law' (1999) 5 *Indonesian Law and Administration Review* 19.
[72] Art 176. [73] Art 177. [74] Art 178. [75] Art 178. [76] Art 179.

- A widow receives a quarter of the share if the deceased does not leave a child, and if the deceased leaves a child, then the widow obtains an eighth.[77]
- If a person dies without leaving children and no longer has a living father, then the siblings of the mother each obtain one-sixth. When there are two or more, then they together obtain one-third.[78]
- If a person dies but has neither a living father nor children, then a uterine or consanguine sister receives half. If there are two or more sisters, then they together receive two-thirds. If there are sisters together with uterine or consanguine brothers, then the brothers receive two shares for every one received by the sisters.[79]

These provisions may, in turn, be grouped into levels of prioritized interests. The first level includes those married to the deceased, and their inheritance depends on whether they had children. The children's inheritance is affected by the existence of other children, and their genders. For instance, if there is a son and a daughter, the son will receive two shares for every one share of the daughter. The estate is then divided among the biological father, and the biological mother, whose portions are affected by whether there are children. The estate next goes to any uterine siblings, and then to consanguine siblings. Anything remaining in the estate is to be divided among the male relatives. Table 22.1 illustrates these points.

Illegitimate children

Indonesian law has traditionally not recognized illegitimate children as heirs. This is because Article 43(1) of the Marriage Law states that a child has a formal relationship only with its mother and her family, and not its father and his family:

> A child born outside a marriage[80] only has a civil legal relationship with its mother and her family.

Reflecting mainstream Sunni Syafi'i doctrine in Indonesia, this provision prevented illegitimate children inheriting from their fathers and their fathers' families, except by grant.[81] Similar provisions appear in the Kompilasi: Article 186, for example, states that an illegitimate child may only inherit from its mother and her family.[82]

In 2012, however, the Constitutional Court recognized some legal rights of illegitimate children.[83] It found that Article 43(1) was 'conditionally unconstitutional' and that to be lawful it must be read as follows.

> A child born out of [valid] marriage has a civil legal relationship with its mother and her family, and its father and his family [provided that paternity] can be proven by science and technology and/or another form of legally-recognised evidence that the father has a blood relationship with the child.

This decision has been criticized for failing to identify the precise constitutional ground that Article 43(1) breached; for leaving ambiguity about whether it applies to all types of

[77] Art 180. [78] Art 181. [79] Art182.

[80] 'Marriage' is defined in Art 42, Marriage Law as *perkawinan yang sah*, or a valid marriage. The word 'marriage' here should therefore be read as 'valid marriage'.

[81] So, for example, the Indonesian Ulama Council (*Majelis Ulama Indonesia*, MUI), Indonesia's leading body for Muslim religious scholars, recently issued Fatwa 11 of 2012 on the Position of Children Born Outside Marriage and Their Treatment. This confirms the traditional *fiqh* that children born outside marriage are not, at least for the purposes of Islamic law, descendants of their biological father and are, therefore, not entitled to inheritance or maintenance from him.

[82] See also Arts 99–100.

[83] Simon Butt, ''Illegitimate' Children and Inheritance in Indonesia' (2012) 37(3) *Alternative Law Journal* 1.

Table 22.1 Inheritance under Islamic Law and the Compilation of Islamic Law (Kompilasi)

Relationship	Inheritor		Requirement	Inheritance apportionment	Authority	
					Al-Qur'an /Hadits	Kompilasi Article
Marriage (current legal status)	1.	Wife/Widow	If there are no children or grandchildren	1/4	An-Nisa' 12	180
			If there are children or grandchildren	1/8		
	2.	Husband/ Widower	If there are no children or grandchildren	1/2	An-Nisa' 12	179
			If there are children or grandchildren	1/4		
Blood relations	1.	Daughter	The only one (no other children or grandchildren)	1/2	An-Nisa' 11	176
			Two or more daughters and no male children or grandchildren	2/3		
	2.	Son	The only one or together with other children or grandchildren (male or female)	The residue after the above portions have been given (*Ashobah*)	An-Nisa' 11 dan Hadist 01	
			Males receive two shares for every one for females			
	3.	Father	If there are no children or grandchildren	1/3	An-Nisa' 11	177
			If there are children or grandchildren	1/6		

4.	Mother	If there are no children or grandchildren and there are two or more relatives who are not from the biological father	1/3	An-Nisa' 11	178
		If there are children or grandchildren and there are two or more relatives who are not from the biological father	1/6	An-Nisa' 11	
		If there are no children or grandchildren and there are not two or more relatives from the biological father	1/3 of the remainder after the wife/widow or husband/ widower has taken		
5.	Uterine relatives	The only one and there are no children or grandchildren and no biological father	1/6	An-Nisa' 12	181
		There are two or more and no children or grandchildren and no biological father	1/3		
6.	Consanguine relatives	The only one and there are no children or grandchildren and no biological father	1/2	An-Nisa' 12	182
		There are two or more and no children or grandchildren and no biological father	2/3		
7.	Male relatives	There is only one or together with other relatives and no children or grandchildren and no biological father	The residue after the above portions have been given (*Ashobah*)	An-Nisa' 12	

Note: Translation of table by Nasichun Amin, M.Ag: <http://www.bimoprasetio.com/dokumen/web-bimo-tabel-ahli-waris-dan-bagian-waris-khi.pdf>.

illegitimate children or only children born to a marriage that was religiously valid but not properly registered; and for confining rights to situations in which parentage can be demonstrated legally, which requires tests that few Indonesians can access.[84]

It is also unclear is whether other courts will apply the Constitutional Court's decision. This is, in part, because the Supreme Court (and thus the lower courts it administers) often reacts slowly to Constitutional Court decisions, if at all, because the Supreme Court sees the Constitutional Court as an institutional rival. It is also because the Kompilasi provision prohibiting illegitimate children from inheriting still stands despite the Constitutional Court's decision, as this court lacks jurisdiction to review the Kompilasi. This is because the Kompilasi is a law below the level of statute in the Indonesian hierarchy of laws and the Constitutional Court's constitutional review power is restricted to statutes, as we explain in Chapter 5.[85] Most religious court judges will probably therefore continue to apply the Kompilasi until the government amends the Kompilasi to implement the Constitutional Court's decision. This has not yet happened.

The case nonetheless represents a positive step towards greater equality in inheritance rights, and provides grounds for children in these 'grey areas' of inheritance law to claim from their father's estate.

Restrictions on non-compliant dispositions

The Kompilasi restricts testators from devising more than one-third of their estate as a gift.[86] The Supreme Court has invalidated grants in wills that exceed this limit.[87]

Non-Muslim inheritance

The Civil Code governs inheritance for non-Muslim Indonesians. The general courts have jurisdiction to hear inheritance disputes.[88]

The Civil Code

During colonial times, the Civil Code applied according to racial identity: Europeans, Dutch, Japanese, and Chinese citizens in Indonesia were subject to the Civil Code; and indigenous Indonesians were left to their own customary laws. Today, however, the Civil Code applies to all Indonesians, unless the matter is governed by Islamic Law, in which case the rules in the Kompilasi apply.[89]

Book II, Chapter XII of the Civil Code deals with inheritance as a subset of property law, and stipulates the process for dividing a deceased's estate. Unlike Islamic inheritance law, the Civil Code does not discriminate between heirs according to gender or age, and all children receive equal shares of inheritance.[90] The Civil Code divides inheritors into different groups, and the presence of somebody from a higher priority group excludes the lower groups from inheriting.[91] Inheritors are blood relations, and spouses at time of death,[92] ranked in the following order of priority:

[84] ibid 2.
[85] The hierarchy is set out in Art 7, Law 12 of 2011 on Lawmaking and is discussed in detail in Chapter 2.
[86] Art 195(2), Kompilasi.
[87] See, for example, *Tati Supiati v Patah etc*. (Religious Court Decision 316/Pdt.G/93/PA.Cbd. *Varia Peradilan* 1998: 65–66) cited in Lukito (n 67) 157.
[88] Barlinti (n 62) 36.
[89] Art 50(2), Law 3 of 2006 amending Law 7 of 1989 on the Religious Courts.
[90] Art 852, Civil Code; Lukito (n 67) 152. [91] Lukito (n 67) 149. [92] Art 832, Civil Code.

1. A surviving husband or wife and any children.[93]
2. Parents and siblings, and their descendants.[94]
3. Family in the ascending line from the father and the mother of the heir.[95] If there are no heirs of one line then their share goes to the other line.
4. Uncles and aunts of the heir from either the father or mother's side, and their descendants to the sixth degree.[96]

The Civil Code divides the estate among these groups by shares. From the first class, children, as mentioned, receive equal shares, regardless of gender or age.[97] A surviving spouse is treated as a legal child, receiving a share equal to that of any children.[98] In the second group, the mother and father receive one-third each, if there is one sibling. If there is more than one, they receive a quarter each with the remainder distributed among the siblings.[99] If the parents have died, the siblings receive the remainder of the estate.[100] The mother or father only inherit the entire estate if the deceased leaves no descendants, no spouse, and no siblings.[101] From the third group onwards, the estate is divided evenly between the paternal line and the maternal line, and then distributed among the heirs of each, a process known as *kloving,* from the Dutch.[102] If there are no heirs left on one line, the other line will receive the remainder of the estate to be divided among them. *Kloving* also applies if it is necessary to continue to the fourth class.[103]

Legal portion

Article 913 of the Civil Code provides that a testator can dispose of his or her property contrary to the rules by will or by disposition while living.[104] However, the amount received by first or second group heirs cannot be reduced below minimum shares fixed in Article 914 of the Civil Code. These minimum shares are known as the *legitieme portie* or legal portion *(bagian mutlak*, 'essential part'). If the testator leaves only one child, that child's minimum share will be half the property. If two children are left, their minimum share will be two-thirds, to be shared equally. If three or more children remain, their minimum share will be three-quarters, equally shared.

Representation

The Civil Code also allows for representation, that is, for children to fill the inheritance position of their parents if their parents predecease the testator.[105] This can only occur in the descending line, for descendants of the heir.[106] For example, if the siblings of the deceased have died, but have left descendants, the children can 'represent' the siblings in the second group, and the apportionment will continue as if the sibling was still alive. The process of representation is perpetual, and can continue down to any grandchildren, and their children.[107]

Excluded heirs

Article 838 of the Civil Code disentitles from inheritance anyone who has:

- been convicted of killing or attempting to kill the deceased;
- been found guilty of slandering the testator by accusing him or her of committing a crime punishable by a prison term of five years or more;

[93] Art 852, Civil Code. [94] Arts 854–59, Civil Code. [95] Art 861, Civil Code.
[96] 'Empat Golongan Ahli Waris Menurut KUH Perdata' *Hukumonline Klinik* (14 December 2012) <http://www.hukumonline.com/klinik/detail/lt4ecc7cf50640b/empat-golongan-ahli-waris-menurut-kuh-perdata>.
[97] Art 852, Civil Code. [98] Art 852a, Civil Code. [99] Art 854, Civil Code.
[100] Art 856, Civil Code. [101] Art 859, Civil Code. [102] Art 853, Civil Code.
[103] Barlinti (n 62) 32. [104] Art 913, Civil Code.
[105] Art 841, Civil Code; see also Art 914. [106] Arts 841–43, Civil Code.
[107] Art 842, Civil Code.

- using violence or actions, prevented the deceased from drafting or revoking his or her final will; or
- obscured, destroyed, or forged the final will of the deceased.

Agreement between heirs

Article 689 of the Civil Code specifically allows for distribution of a deceased estate in a way contrary to the Civil Code rules if the heirs agree. To do this, all those entitled to inherit under those rules must have legal capacity[108] and be present at the time of distribution.[109]

Adopted or foster children

Inheritance is solely the right of blood relations and spouses.[110] While adopted or foster children are not 'children' for the purposes of the first group, they can inherit by way of grant, provided the statutory heirs' *legitieme portie* is maintained.[111]

Adat and inheritance

Traditional customary laws can vary enormously from place to place in Indonesia, with some even predating the gradual adoption of Islamic legal traditions from the fifteenth century and the introduction of the Civil Code in the nineteenth century. In some places, adat has absorbed these influences; in others, it has ignored or even overruled them. In yet others, adat has been entirely displaced.

We examine the place of adat in the national legal system in Chapter 7, arguing that, since Independence in 1945, it has increasingly been restricted or even excluded. Here, we do not survey the many different adat inheritance systems existing across the archipelago, because the 2006 reforms, discussed above, remove the choice of law option and have thus have hugely limited the potential use of adat in family law disputes that reach the courts.[112] In most cases, the courts now ignore adat and simply apply either the Kompilasi or the Civil Code, depending on the religion of the parties involved.

The traditional rules of inheritance of the Sasak people in Lombok, a predominantly Muslim island, are an example of the impact this has had. Sasak adat has long been patrilineal[113] and, in fact, goes beyond mainstream Islamic teachings in this regard. While the *farai'd* rules allow a daughter one part to every two of the son's shares, Sasak adat prevents the daughter from receiving any inheritance other than her dower, as inheritance flows solely to males. Since the reforms of 2006, however, a Muslim Sasak woman may claim a greater share of inheritance than she could have at traditional adat. This is because Muslims are now subject to the Kompilasi rules, as discussed above.[114] Even on a conservative Syafi'i interpretation, women may inherit more than just the dower, and if Hazairin's bilateral interpretation is adopted, their position is even stronger, as is shown in our discussion of Inaq Putrahimah's case, above, which involved an inheritance dispute in Lombok.

[108] Art 1330, Civil Code provides that a person obtains legal capacity (*kecakapan hukum*) upon turning twenty-one or marrying, whichever is earlier, but there is debate about the application of this provision. See Chapter 15 for discussion of the lack of clarity about the age of legal capacity.

[109] Art 1069, Civil Code. [110] Art 862–65, Civil Code. [111] Art 874, Civil Code.

[112] Barlinti (n 62) 32.

[113] David K Linnan, *Legitimacy, Legal Development and Change: Law and Modernization Reconsidered* (Routledge 2016) 7–8.

[114] ibid.

Glossary

Adat Traditional custom/customary law
Aashabu'l fara'id Heirs, including women, who receive the residuary of a deceased estate
Abolisi Release while on trial
Acara pemeriksaan biasa Ordinary examination (trial)
Acara pemeriksaan cepat Expedited examination (trial)
Acara pemeriksaan singkat Summary examination (trial)
Akta bawah tangan 'Deed under hand', a deed that is not notarized
Akta nikah Marriage deed or certificate
Akta notaris Notarial deed
Akta otentik Authentic (notarized) deed
Akta perdamaian Settlement agreement
Alat bukti yang sah Valid piece of evidence
Amar putusan Holding, court orders
Amnesti Release from imprisonment of a class of prisoners
Anak Child
Anak laki-laki Male child
Asabah Male agnatic kin
Asas kekeluargaan Family principle
Azas tunggal Sole foundation
Badan hukum Legal entity
Badan Pertanahan Nasional National Land Agency
Badan usaha milik negara State-owned legal enterprise
Bagian mutlak Essential part (*legitieme portie*)
Bahwa That, whereas, noting that
Balai Harta Peninggalan State Estate Property Bureau
Banding Appeal
Bantuan hukum Legal aid
Barang Goods
Batal demi hukum Void by law
Bebas murni Acquittal on the merits
Bebas tidak murni Acquittal other than on the merits
Berita acara Report or dossier
Berita Negara Republic Indonesia State Gazette
Buku nikah Marriage book
Bupati Regent (head of a kabupaten or county)
Commanditaire vennotschap Limited partnership
Dasar negara Basis of the state, grundnorm
Delik aduan Complaint offence
Delik biasa Normal offence
Democracy terpimpin Guided democracy, led by former president Soekarno (1945–66)
Dewan Pers Press Council

Dewan Syariah Nasional National Shari'a Council

Ditetapkan Stipulated

Ditutup demi hukum Closed by law

Dwifungsi Dual function (of the military)

Ekonomi keraykatan People's economy

Ekonomi syari'ah Islamic economy

Fara'id Muslim inheritance

Fatwa Legal opinion

Fiqh Islamic jurisprudence

Firma Partnership

Fraksi Faction (political)

Gotong royong 'Mutual self-help', community members assisting one another as required

Grasi Clemency

Hak Right

Hak angket Right to summon and question

Hak asasi Fundamental right

Hak guna bangunan Building right

Hak guna usaha Cultivation right

Hak milik Ownership right

Hak milik atas satuan rumah susun Strata title

Hak pakai Usage right

Hak pemungutan hasil Forestry product harvesting right

Hak pengusahaan hutan Forestry exploitation right

Hak pengusahaan perairan pesisir Coastal water right

Hak sewa Leasehold

Hak ulayat Communal title

Hakim Judge

Hakim pemeriksa pendahuluan Investigating judge

Harta bawaan Property brought into a marriage by a spouse, which the spouse always retains

Harta bersama Property acquired during marriage, to which spouses are equally entitled

Harta gono-gini Property acquired during marriage, to which spouses are equally entitled

Hibah Bequest

Hukum Law

Hukum Jinayat (Islamic) criminal law

Hutan hak Forest over which concessions or rights have been granted

Hutan negara State forest

Iddah Prescribed waiting period for a Muslim woman following divorce or the death of her husband

Ijarah Rent-to-buy transaction

Ikhtilath 'Intermingling', forbidden consensual intimate relations, such as flirting, touching, hugging and kissing, between an unmarried male and female in a private or public area

Infaq Islamic pious donations

Infaq Charitable gift

Instruksi presiden Presidential instruction

Integralistic staatsidee Integralist state idea

Interpelasi Interpellation

Irah-irah The words *Demi Keadilan Berdasarkan Ketuhanan yang Maha Esa* ('For Justice, based on Almighty God'), which appear at the head of all court decisions

Islah Reconciliation

Istimewa Special

Jaksa Public prosecutor/attorney general

Kabupaten County or regency, region below the level of province, headed by a bupati

Kamar Room, chamber

Kantor Office

Kantor Urusan Agama Office of Religious Affairs

Kasasi Cassation, a form of appeal heard by the Supreme Court

Katolik Roman Catholic Christianity

Kawasan khusus Special areas

Kawin Marry

Kawin di bawah tangan Unregistered marriage

Kawin kampung Unregistered marriage

Kawin sirih Unregistered marriage

Keadilan Justice

Keamanan Security

Kebenaran Truth

Kecamatan Sub-district

Kejahatan Felony

Kekeluargaan 'Familiness'

Kemanusiaan Yang Adil dan Beradab A Just and Civilized Humanity

Kepailitan Bankruptcy/insolvency

Kepala daerah Regional head

Kepala desa Village head

Kepastian dan keamanan Certainty and security

Kepastian hukum Legal certainty

Kepercayaan Beliefs

Keputusan Decision

Keputusan menteri Ministerial decision

Keputusan presiden Presidential decision

Ketentuan peralihan Transitional provisions

Ketua Chair, head, chief

Ketuhanan yang Maha Esa Almighty God

Keyakinan Conviction, strong belief

Khalwat 'Seclusion', an Islamic offence of prohibited proximity between sexes, in private

Khamar Alcohol

Khusus Special

Koin Peduli Prita Coins for Prita

Komisi Commission

Komisi Aparatur Sipil Negara National Civil Service Commission

Konstituante Constituent Assembly

Kota City

Kretek Clove cigarette

Kristen Protestant Christianity

Kurator Curator, receiver

Kurungan 'Confinement' or light imprisonment

Lampiran Appendix

Legitieme portie Legal portion

Lex posteriori derogat lex priori A more recently enacted law prevails over an earlier law if they conflict

Lex specialis derogat lex generalis A specialist law prevails over a law of a general nature if they conflict

Liwath Sodomy

Lurah Village head

Maatschap General partnership

Machtsstaat State based on power

Mafia hukum Legal mafia

Mafia peradilan Judicial mafia

Mahkamah Agung Supreme Court

Mahkamah Konstitusi Constitutional Court

Mahkamah Syar'iyah Shari'a court (Aceh)

Mahr marriage gift

Maisir Gambling

Majelis Khormatan Mahkamah Konstitusi Constitutional Court Honour Council

Maklumat Decree

Maklumat A form of presidential decree

Masyarakat adat *Adat* community

Memperhatikan pertimbangan Consider the views of

Mempunyai kekuatan hukum tetap permanent legal force, binding

Memutuskan Decide

Mengabulkan Uphold

Mengadili To decide

Mengingat Remembering

Menimbang Considering or whereas

Menimbang bahwa Considering that

Menimbulkan keresahan Cause unrest

Meterai Stamp duty sticker

Muda Young, junior, deputy

Mudarabah Islamic banking based on a profit and loss-sharing concept between a depositor and the bank

Murabahah Islamic banking contract where the seller sells an asset to another person adding some profit or mark-up that is known to the buyer

Musahaqah Lesbian sex

Musyawarah dan mufakat Deliberation and consensus

Nafkah Maintenance or alimony

Naskah akademik Academic draft (accompanies a Bill)

Nebis in idem Prohibition of double jeopardy

Negara hukum Law state, rule of law

New Order Regime led by former president Soeharto (1966–98)

Novum New determinative evidence (in a PK)

Orde Baru, Orba New Order (Soeharto era)

Orde Lama Old Order (Soekarno era)

Otonomi daerah Regional autonomy

Otonomi khusus Special autonomy

Pamong praja Civil police unit

Pancasila The Five Principles, Indonesia's state philosophy

Panitia Urusan Ketatanegaraan dan Hukum Tatanegara Constitutionalism and Constitutional Law Committee

Partai demokrat Democratic Party

Pasal demi pasal Article by article

Pegawai pencatat nikah Marriage registrar

Pejabat Official

Pejabat pembuat akta tanah Land conveyance official

Pekerjaan-pekerjaan yang terburuk Worst kinds of work

Peleburan Amalgamation

Pembangunan Economic development

Pembebasan bersyarat Parole, conditional release

Pemberantasan korupsi Corruption eradication

Pembuktian terbalik Reverse burden of proof

Pemeriksaan Examination or trial

Pemuda Youth

Penetapan Order

Penetapan presiden Presidential stipulation

Pengadilan Court

Pengadilan agama Religious court

Pengadilan hak asasi manusia Human rights court

Pengadilan hubungan industrial Industrial relations court

Pengadilan khusus Special court

Pengadilan militer Military court

Pengadilan negeri District court

Pengadilan niaga Commercial court

Pengadilan pajak Tax court

Pengadilan perikanan Fishery court

Pengadilan pertempuran Conflict court (military)

Pengadilan tata usaha negara Administrative court

Pengadilan tinggi agama/militer/tata usaha negara/umum High religious/military/administrative/general courts

Pengadilan tipikor *Pengadilan Tindak Pidana Korupsi*, Anti-corruption court

Pengadilan umum General courts

Pengadilan utama militer Supreme military court
Penganiayaan Mistreatment (criminal)
Penggabungan Integration
Penghinaan ringan Minor insult or slander
Peninjauan kembali Reconsideration, a re-opening and review of a 'final' case by the Supreme Court
Penjelasan Elucidation (explanatory memorandum)
Penodaan Dishonouring
Penuntutan Indictment
Penyandang cacat Disabled person
Penyelesaian Resolution
Penyelidikan Preliminary enquiry
Penyidikan Investigation
Peradilan Judicial
Peraturan Regulation
Peraturan daerah (perda) Regional regulation
Peraturan desa Village regulation
Peraturan menteri Ministerial regulation
Peraturan pelaksanaan Implementing regulation
Peraturan pemerintah Government regulation
Peraturan presiden Presidential regulation
Perkawinan Marriage
Perlakuan yang tak menyenangkan Offensive treatment
Persatuan Indonesia The unity of Indonesia
Perseroan Company
Perseroan terbatas Limited liability company
Pertahanan Defence
Pertanggungjawaban Holding to account
Pertimbangan hukum Legal considerations
Petunjuk Circumstantial evidence
Piagam Jakarta Jakarta Charter
Pidana cepat 'Fast crimes', summary criminal cases
Pidana pengawasan Supervised detention
Pihak ketiga Third party
Pistole Right of a prisoner to improve his or her conditions
Polisi Police
Praperadilan Pre-trial hearing
Propinsi Province
Putusan Decision
Qadzaf Accusing someone of rape without being able to present four witnesses
Qanun Regional regulation (of the province of Aceh)
Qardh Interest free loan
Rakyat The People
Rechtsstaat Law state

Reformasi Reformation, the post-Soeharto era
Rehabilitasi Rehabilitation of the reputation of a defendant accused of a crime who is acquitted
Remisi Remission of a sentence
Retribusi Fee for government services
Riba Commonly understood as any form of interest
Rujuk Reconciliation (with spouse after divorce)
Sadaqah Islamic pious donations
Satu atap One roof
Sementara Temporary
Serikat pekerja/serikat buruh Labour union
Sesat Deviant (of religious belief)
Shadaqah Gift to the needy
Shari'ah Islamic law
Sidang istimewa Special session
Sila Principle
Sisa suara Surplus votes
Sishankamrata Total people's defence system
Sistem stasiun jaringan Network broadcasting system
Suara terbanyak Majority vote
Suasana kekeluargaan Familial atmosphere
Sukuk Islamic bonds
Surat edaran Circular letter, practice note
Surat keterangan miskin Proof of poverty letter
Surat kuasa Written grant of authority, power of attorney
Talak 'I divorce you'
Tentang Duduk Perkara Regarding the position of the case
Tentang Hukumnya Regarding the law
Tentang Pertimbangan Hukum Regarding legal considerations
Tersangka Suspect
Tindak pidana Crime
Tindak pidana khusus Special crime
Tindak pidana ringan 'Light crime', misdemeanour
Trias politika Political triad—separation of powers
Tuhan God
Tujuh kata Seven words (the Piagam Jakarta or Jakarta Charter)
Uji formil Formal review
Uji materiil Material review
Ulama Islamic scholars
Undang-undang Statute
Undang-undang Dasar The Constitution
Undang-undang pokok Basic law
Usul inisiatif DPR A Bill proposed by the DPR
Usul inisiatif Presiden A Bill proposed by the president
Wakaf Islamic charitable foundation, trust, or endowment

Wakil Deputy

Wali Trusted person or guardian, typically of the bride at an Islamic wedding

Walikota Mayor

Waris Succession

Wasiat Wills and testaments

Yayasan Foundation

Yurisprudensi 'Jurisprudence', leading decisions of the Indonesian Supreme Court usually followed by lower courts

Zakat Charitable contribution required to be made by a Muslim in accordance with Muslim law; Islamic alms-giving

Zina Adultery

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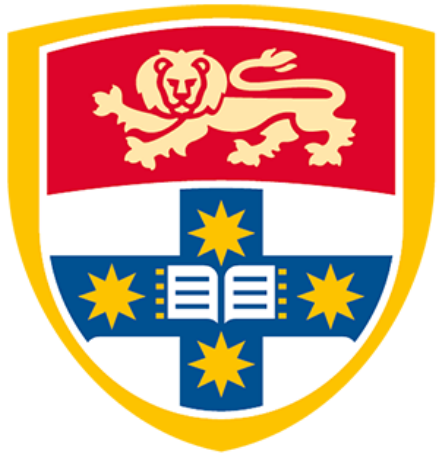

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